

No. 92-1168-CFX Title: Teresa Harris, Petitioner
v.
Forklift Systems, Inc.

Docketed: Court: United States Court of Appeals for
December 15, 1992 the Sixth Circuit

Entry Date Proceedings and Orders

Dec 15 1992	Petition for writ of certiorari filed.
Jan 21 1993	Brief of respondent Forklift Systems, Inc. in opposition filed.
Jan 27 1993	DISTRIBUTED. February 19, 1993
Feb 22 1993	REDISTRIBUTED. February 26, 1993
Mar 1 1993	Petition GRANTED.

Mar 23 1993	Order extending time to file brief of petitioner on the merits until April 30, 1993.
Apr 9 1993	Joint appendix filed.
Apr 29 1993	Brief amici curiae of United States, et al. filed.
Apr 30 1993	Brief amicus curiae of National Conference of Women's Bar Associations filed.
Apr 30 1993	Brief amici curiae of NOW Legal Defense & Educational Fund, et al. filed.
Apr 30 1993	Brief amici curiae of NAACP Legal Defense & Educational Fund, Inc., et al. filed.
Apr 30 1993	Brief amici curiae of Employment Law Center, et al. filed.
Apr 30 1993	Brief amici curiae of Women's Legal Defense Fund, et al. filed.
Apr 30 1993	Brief amicus curiae of American Psychological Association filed.
Apr 30 1993	Brief amici curiae of Southern States Police Assn. filed.
Apr 30 1993	Brief of petitioner Teresa Harris filed.
Apr 30 1993	Brief amicus curiae of Feminists for Free Expression filed.
Apr 30 1993	Brief amicus curiae of National Employment Lawyers Association filed.
Apr 30 1993	Brief amici curiae of American Civil Liberties Union, et al. filed.
May 11 1993	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
May 24 1993	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jun 1 1993	Brief amicus curiae of Equal Employment Advisory Council filed.
Jun 1 1993	Brief of respondent Forklift Systems, Inc. filed.
Jul 2 1993	Reply brief of petitioner filed.
Aug 10 1993	CIRCULATED.
Aug 16 1993	SET FOR ARGUMENT WEDNESDAY, OCTOBER 13, 1993. (2ND CASE).
Sep 2 1993	Record filed.
Sep 7 1993	Record filed.
Oct 13 1993	ARGUED.

92-1168

No. 92-_____

Supreme Court, U.S.

FILED
DEC 15 1992

JAN 7 1993

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

TERESA HARRIS

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Petitioner

v.

FORKLIFT SYSTEMS, INC.

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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..

QUESTIONS PRESENTED

1. Is a plaintiff in a sexual harassment case also required to prove, in order to prevail, that she suffered severe psychological injury when the Trial Court has found that she was offended by conduct that would have offended a reasonable victim in the position of the plaintiff?

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No. 92-_____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

TERESA HARRIS

Petitioner

v.

FORKLIFT SYSTEMS, INC.

Respondent

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that
a writ of certiorari issue to review the
judgment and opinion of the United States
Court of Appeals for the Sixth Circuit

entered in the above-entitled proceeding on September 17, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit has not been reported.

The opinion of the United States District Court for the Middle District of Tennessee has not been reported.

STATEMENT OF JURISDICTION

Petitioner filed her Complaint seeking damages and injunctive relief for alleged violations of 42 U.S.C. § 2000(e) in the United States District Court for the Middle District of Tennessee on July 7, 1989.

The case was tried before the United States Magistrate who issued his Report and

Recommendation on Petitioner's Complaint on November 28, 1991.

Petitioner filed timely objections to the Report and Recommendation which was adopted by the District Court on January 18, 1991.

Petitioner filed a timely notice of appeal with respect to the case on the merits. The District Court also issued a ruling on Petitioner's Motion for Attorney Fees and Costs arising from Respondent's failure to admit certain facts from which both parties appealed. Petitioner is not seeking review of the decisions below on her Motion for Attorney Fees and Costs.

On September 17, 1992, the Sixth Circuit issued its opinion affirming the District Court. No Petition for Rehearing was filed.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

§ 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a):

It is unlawful employment practice for an employer --

. . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE¹

Teresa Harris was employed as Rental Manager of Forklift Systems, Inc., from April 22, 1985 until October 1, 1987. She was initially assigned responsibility for management of leased equipment and sales coordinator for the sales department.

Forklift Systems, Inc. (hereinafter "Forklift") is a Tennessee corporation in the business of selling, leasing and repairing forklift machines and is an employer within the meaning of 42 U.S.C. §§ 2000(e)-(b).

Of the six managers employed by Defendant during the period of Ms. Harris' employment, four were male and two were female. Other than Ms. Harris, the remain-

¹Extensive findings of fact were made by the Magistrate. No objections to the findings were made by the Respondent.

ing female manager was the daughter of the President of Forklift.

During the course of Teresa Harris' employment, Charles Hardy, the President of Forklift, directed sex-based derogatory conduct towards Teresa Harris including the following:

(a) Hardy stated to Ms. Harris in the presence of other employees of Forklift "You're a woman, what do you know," on a number of occasions during the period of plaintiff's employment, and "You're a dumb ass woman," at least once;

(b) Hardy, on a number of occasions, stated to Ms. Harris in the presence of other employees of Forklift, "We need a man as the rental manager."

(c) Hardy, in front of a group of other employees of Forklift and a Nissan factory representative stated to plaintiff,

"Let's go to the Holiday Inn to negotiate your raise." However, Ms. Harris knew this was meant as a joke, and treated it as a joke at the time.

(d) Hardy asked Ms. Harris and other female employees, but not male employees of Forklift, to retrieve coins from his front pants pocket.

(e) Hardy threw objects on the ground in front of Ms. Harris and other female employees of Forklift, but not male employees, and asked them to pick the object up, thereafter making comments about female employees' attire.

(f) Hardy commented with sexual innuendos about clothing worn by Ms. Harris and other female employees of Forklift, but not male employees.

(g) Hardy directed Ms. Harris to bring coffee into a manager meeting on at

least one occasion, a request he did not make to male managers.

(h) In September, 1987, after Ms. Harris complained to Mr. Hardy about his sexually derogatory behavior, Mr. Hardy asked Teresa Harris in front of other employees of Forklift, "What did you do, promise the guy at ASI (Alladin Synergetics, Incorporated) some 'bugger' Saturday night?"

As many of the statements and actions of Charles Hardy made specific reference to the female gender ("You're a dumb ass woman") ("What did you do, promise the guy at ASI some 'bugger' Saturday night?"), they were clearly directed to Ms. Harris because she was female.

Rather than dispute these statements and actions, Charles Hardy took the position at trial they were only intended as

"jokes," and were not taken by other female employees as serious. Three female clerical employees testified that they did not take the "coin" behavior seriously. However, Stephanie Vanns, Mr. Hardy's secretary, testified that she could understand how and why another person could have taken it otherwise. David Thompson, a former employee of Defendant, testified that he would not tolerate Charles Hardy talking to his wife as Charles Hardy talked to Teresa Harris at Forklift.

The behavior, conduct and actions by Charles Hardy escalated in frequency, tone and severity over the course of Ms. Harris' employment. At first, Ms. Harris tried to ignore Mr. Hardy's offensive behavior and conduct by not talking to him.

Ms. Harris testified she had spoken to Charles Hardy in 1986 about the general

manner in which he was treating her during her employment, but she did not complain to him specifically about the sexually offensive nature of his conduct and actions until August 18, 1987.

By mid-1987, Ms. Harris was experiencing extreme anxiety and emotional upset because of Mr. Hardy's behavior: she did not want to go to work; she cried frequently; she began drinking heavily outside of work; and her relationship with her children became strained.

On August 18, 1987, Ms. Harris met with Charles Hardy to complain about his abusive and harassing behavior. During the meeting he admitted to many of the actions but said that he was only "joking." He stated that he did not realize that his actions bothered Ms. Harris and promised to change his behavior. Ms. Harris had en-

tered the meeting with the intent of resigning. Mr. Hardy's apology and intent to reform resulted in Ms. Harris changing her mind. Ms. Harris secretly taped the conversation without Mr. Hardy's knowledge.

Notwithstanding his promise to change his behavior, within a short period of time, however, the same offensive and harassing behavior she had previously complained about began again. In a statement in front of other employees, in mid-September, Mr. Hardy stated that Ms. Harris had promised sexual favors to secure an account from a client. Mr. Hardy never disputed that he made the statement.

At that point, Ms. Harris realized that Mr. Hardy would never change and that, in order to preserve her self-respect and avoid his antagonizing, derogatory and demeaning behavior directed towards her

because she was a woman, she would have to leave her job which she did on October 1, 1982.

In the ruling below, the District Court found that Charles Hardy's behavior was crude and vulgar and would have offended a reasonable female manager. However, because the District Court did not find that Teresa Harris suffered serious psychological injury, her action was dismissed.

REASONS FOR GRANTING THE WRIT

- I. THERE IS A DIRECT CONFLICT AMONG SIX CIRCUIT COURTS OF APPEALS ON THE QUESTION OF WHETHER A TITLE VII PLAINTIFF MUST DEMONSTRATE THAT THE OFFENSIVE CONDUCT SERIOUSLY AFFECTED HIS OR HER PSYCHOLOGICAL WELL-BEING.

Employment discrimination on the basis of sex remains a matter of significant public concern. United States Merit Protection Board. *Sexual Harassment in the Federal Government: An Update* (1988); see, Civil Rights Act of 1991, § 202, 42 U.S.C. § 2000(e).

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), et seq., provides that "it is unlawful for an employer to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment . . .

because of such individual's race, color, religion, sex, or national origin. Title VII invests in employees the right to work in an "environment free from discriminatory intimidation, ridicule and insult." Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed. 2d 49 (1986).

In 1986, this Court found that a hostile working environment in violation of Title VII where sexual harassment is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Meritor, 477 U.S. at 67, 106 S.Ct. at 2405, (1986).

The Court also observed that "one can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group

workers." Meritor, 477 U.S. at 66, 106 Sup.Ct. at 2405, Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972).

However, this Court did not at that time, nor since, further clarify what degree of psychological injury, if any, a sexual harassment plaintiff must prove in order to prevail in his or her claim.

Without clear guidance from this Court, the Circuit Courts of Appeals have diverged on whether a Title VII plaintiff must necessarily prove that he or she has suffered serious psychological injury as a result of sexually offensive conduct.

Three Circuits, the Sixth, as in this case, the Seventh and the Eleventh, have concluded that in a sexual harassment case, a plaintiff must not only prove that the complained of conduct would have offended a

reasonable victim and that he or she was actually offended, but also that he or she suffered serious psychological injury as a result of the conduct. Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986); Scott v. Sears Roebuck, 798 F.2d 210 (7th Cir. 1986); Brooms v. Regal Tube, 830 F.2d 1554 (11th Cir. 1987).

On the other hand, three other Circuits, the Third, the Eighth, and the Ninth, have concluded that a Title VII plaintiff must only show that he or she has been offended and that the complained of conduct would have offended a reasonable victim. Andrews v. City of Philadelphia, 895 F.2d 1469 (3rd Cir. 1990); Burns v. MacGregor Electronic Ind., Inc., 955 F.2d 559 (8th Cir. 1992); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

This Court should grant certiorari to resolve the divergent analyses among the Circuit Courts of Appeals with regard to whether a necessary element of Title VII sexual harassment case is that the plaintiff prove that he or she suffered serious psychological injury as a result of the complained of behavior.

II. THE DECISIONS BELOW RAISES
IMPORTANT QUESTIONS REGARD-
ING THE STANDARD OF PROOF IN
A SEXUAL HARASSMENT CASE.

Although this Court held in Meritor Savings Bank v. Vinson, that a sexual harassment claim can be based on a hostile work environment theory under Title VII, the Court provided limited guidance regarding the necessary elements of proof for a successful claim. Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed. 2d 49 (1986).

In the Vinson case, this Court held that a Title VII violation may be proved a showing that discrimination based on sex has created a hostile or abusive work environment and such harassment must be sufficient enough to effect a "term condition or privilege" of employment within the meaning of Title VII. Thus, "for sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of (the victim's) employment' and create an abusive working environment." Meritor Savings Bank v. Vinson, 477 U.S. at 67, 106 S.Ct. at 2405 (1986).

In reaching this decision, this Court relied upon prior decisions of the Fifth and Eleventh Circuit Courts of Appeal as well as Guidelines that had been adopted by the Equal Employment Opportunity Commission. Rogers v. EEOC, 454 F.2d 234 (5th

Cir. 1971) cert denied, 406 U.S. 957, 92 S.Ct. 2058 (1972); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); *Guidelines on Discrimination Based on Sex*, 29 C.F.R. 1604.11 (1980).

Prior to Vinson, liability based upon a hostile racial environment had been recognized by numerous circuit courts of appeals and extended to include harassment based on religion and national origin. The Court then went on to note that "nothing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited." Meritor Savings Bank v. Vinson, 477 U.S. at 67, 106 S.Ct. at 2399 (1986).

The Court then specifically recognized that a Title VII violation may be established by proving discrimination based on sex has created a hostile or abusive work

environment referring with approval to the Henson case.

Finally, the Court relied upon the Guidelines promulgated by the Equal Employment Opportunity Commission observing that prohibited sexual harassment may arise where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment. Meritor Savings Bank v. Vinson, 477 U.S. at 65, 106 S.Ct. at 2404 citing *Guidelines on Discrimination Based on Sex*, 29 C.F.R. 1604.11(a)(3).

The case of Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986) was the first Circuit Court of Appeals case applying the Vinson ruling to a sexual harassment complaint.

In that case, the Sixth Circuit itemized the elements of a Title VII claim for sexual harassment as follows:

(1) the employee was a member of a protected class; (2) the employee was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based on sex; (4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance in creating an intimidating, hostile or offensive working environment that affected seriously the psychological well-being of the plaintiff; and (5) the existence of respondeat superior liability. Rabidue, 805 F.2d at 619-620.

Without any specific citation to Vinson, the Sixth Circuit incorporated dicta from the Rogers case, imposing on a plaintiff that he or she also established that his or her psychological well-being was affected by the complained of conduct. see Rogers v. EEOC, 454 F.2d 234 at 238 (5th Cir. 1971).

Relying on Rabidue, Eleventh Circuit Court of Appeal also incorporated, within its standard, the requirement that a sexual harassment plaintiff establish that he or she suffered serious psychological injury as a result of the offensive conduct. Brooms v. Regal Tube, 830 F.2d 1554 (11th Cir. 1987). The Seventh Circuit modified this requirement somewhat to the effect that the plaintiff must document that he or she has suffered anxiety and debilitation.

Scott v. Sears Roebuck, 798 F.2d 210 (7th Cir. 1986).

The majority opinion in Rabidue, however, was countered by a strong dissent by Judge Keith who lodged three main criticisms of the majority's analysis. First, rather than analyze such cases from a reasonable person's perspective, the view of the reasonable victim should be taken:

Unless the perspective of the reasonable victim is adopted, courts . . . [will] sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men. Rabidue, 805 F.2d at 626. (J. Keith, dissenting).

It appears that Judge Keith's reasoning, in this respect, has since been adopted by the Sixth Circuit. Yates v. Avco Corp., 819 F.2d 630, 637, n. 2 (6th Cir. 1987).

Second, the majority held that in determining whether sexual harassment created an offensive working environment,

the prevailing work environment had to be considered as well as the background of the plaintiff's co-workers and superiors. Rabidue, 805 F.2d at 620. Judge Keith argued that the purpose of Title VII is "to prevent said behavior from poisoning the work environment of classes protected under the Act." Rabidue, 805 F.2d at 626. (J. Keith, dissenting). Thus, the background of the defendant and co-workers is irrelevant. Id. at 627.

The Sixth Circuit appears to have now adopted Judge Keith's reasoning in this regard as well in its decision in the case of Davis v. Monsanto Chemical, 858 F.2d 345 (6th Cir. 1988). As the Court stated:

Title VII was not intended to eliminate immediately all private prejudice and biases. That law, however, did alter the dynamics of the workplace because it operates to prevent bigots from harassing their co-workers . . . By informing people that the expression of racist or sexist attitudes in

public is unacceptable, people may eventually learn that such views are undesirable in private, as well. Thus, Title VII may advance the goal of eliminating prejudices and biases in our society. Davis, 858 F.2d at 350.

The facts in Davis concerned allegations of a racially hostile environment and the Court distinguished the elements for such a cause of action from a sexually hostile environment.² However, the reference to both "racist and sexist" attitudes in the above quotation clearly indicates that existing attitudes and behavior of either type are not to be tolerated.

Finally, Judge Keith suggested that anti-female language and behavior, would per se, affect the psychological well-being of a reasonable woman victim. Rabidue, 805 F.2d at 626 (J. Keith, dissenting). As

²The Sixth Circuit, thus, requires a higher standard of proof in a hostile environment case based on gender than in one based on race.

such, he suggested that the elements of proof in a sexual harassment case should focus on whether the conduct would offend a reasonable victim rather than whether the victim suffered serious psychological injury. Rabidue, 805 F.2d at 627 (J. Keith, dissenting).

As noted above, at least two circuits have adopted approaches similar to Judge Keith's, rejecting or diminishing any requirement that a plaintiff prove that the offensive behavior seriously affected his or her psychological well-being. Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Andrews v. City of Philadelphia, 895 F.2d 1469 (11th Cir. 1990). Rather, the Ninth and Eleventh Circuits have focused their analysis on the harasser's conduct.

In addition, The Equal Employment Opportunity Commission has been critical of

the standard adopted by the Sixth, Seventh and Eleventh Circuits requiring that a Title VII plaintiff establish that he or she has suffered serious psychological injury. *EEOC Policy Guidance on Current Issues of Sexual Harassment, CCH Employment Practices*, ¶ 5258 at 6928, March 19, 1990. As the Commission notes, "it is sufficient for the charging party to show that the harassment was unwelcome and that it would have substantially affected the working environment of a reasonable person." *Id.* ¶ 5258 at 6928, n. 20.

Following the reasoning of the EEOC Guidance, the Ninth Circuit has eliminated separate consideration of any subjective element beyond whether the harassment was unwelcome. *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991). As noted above, the Ninth Circuit holds that so long as the

harasser's conduct is pervasive and the harassment is unwelcome, a hostile environment claim should be sustained. *Ellison* at 878.

The Petitioner would invite this Court to consider the holdings of the courts below to the extent that they require a plaintiff to prove that she or he suffered serious psychological injury in order to prevail in a sexual harassment case.

Under the standard established in the *Ellison* and *Andrews* cases and in the *EEOC Guidance on Sexual Harassment*, the findings below that Teresa Harris was the subject of a continuing pattern of sex-based derogatory conduct from Charles Hardy and that Mr. Hardy's conduct offended Teresa Harris and would offend a reasonable woman manager, should be sufficient to grant judgment to

Teresa Harris on her sexual harassment claim.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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A P P E N D I C E S

NOT RECOMMENDED FOR PUBLICATION

Nos. 91-5301/5871/5822

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TERESA HARRIS,)	
)	
Plaintiff-Appellant)	
(91-5301))	
Plaintiff-Cross Appellant)	
(91-5871))	
Plaintiff-Appellee,)	ON APPEAL FROM
)	THE UNITED
v.)	STATES DISTRICT
)	COURT FOR THE
)	MIDDLE DISTRICT
FORKLIFT SYSTEMS, INC.)	OF TENNESSEE.
)	
Defendant-Appellant)	NOT RECOMMENDED
(91-5822))	FOR FULL-TEXT
Defendant-Appellee/)	PUBLICATION.
Cross-Appellee.)	Sixth Circuit
)	Rule 24 limits
)	citation to
)	specific situa-
)	tions. Please
)	see Rule 24
)	before citing
)	in a proceeding
)	in a court in
)	the Sixth
)	Circuit. If
)	cited, a copy

must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

BEFORE: NELSON, NORRIS and SUHRHEINRICH,
Circuit Judges

PER CURIAM. Plaintiff, Teresa Harris, appeals from a judgment of the district court dismissing her complaint, and also from an order declining one of her requests for an award of sanctions stemming from defendant's failure to make admissions. Defendant, Forklift Systems, Inc., appeals the award of sanctions that the district court did enter in response to plaintiff's other request.

Having had the benefit of oral argument, and having carefully considered the record on appeal and the briefs of the parties, we are not persuaded that the

district court erred in either of the orders appealed from.

As the reasons why judgment should be entered for defendant and sanctions should be awarded in the one instance and declined in the other, have been articulated by the district court, the issuance of a written opinion by this court would be duplicative and serve no useful purpose. Accordingly, the orders of the district court are affirmed upon the reasoning found in the report and recommendation of the magistrate judge filed on November 27, 1990, and the memorandum opinion of the district court dated May 21, 1991.

FILED: September 17, 1992

LEONARD GREEN, Clerk

A-4

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

TERESA HARRIS,)
)
VS.) DOCKET NO. 3-89-0557
)
FORKLIFT SYSTEMS,)
INC.)

ORDER

The Court is in receipt of the Report and Recommendation issued by the Magistrate in the above-styled action, the plaintiff's objections and memorandum in support thereof, and the defendant's response to plaintiff's objections. Finding the objections to be without merit, the Court hereby ADOPTS the Magistrate's Report and Recommendation, and accordingly the case is DISMISSED.

A-5

Entered this 4th day of February,
1991.

/s/ Judge John T. Nixon
United States District Judge

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

TERESA HARRIS)
)
 v.) NO. 3:89-0557
)
FORKLIFT SYSTEMS,)
INC.,)

TO: Honorable John T. Nixon,
 District Judge

REPORT AND RECOMMENDATION

Plaintiff filed this claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e on July 7, 1989. The matter was referred to the undersigned as Special Master on July 21, 1989, pursuant to the provisions of 42 U.S.C. § 2000e-5(f)(5), Federal Rules of Civil Procedure 53, and the Local Rules of Court. Following a first meeting of the parties, a scheduling order was entered and trial was heard before the undersigned on July 23, 1990.

Plaintiff, the former Rental Manager for defendant Forklift Systems, Inc. ["Forklift"], claims that she was constructively discharged because of a sexually hostile work environment created by Forklift's President, Charles Hardy. Defendant's theory is that plaintiff walked off the job on October 1, 1987, because defendant had terminated its business relationship with plaintiff's husband. The following are my findings of fact, conclusions of law, and recommendation for disposition.

FINDINGS OF FACT

The parties agree that Title VII jurisdictional requirements are met in this case. Plaintiff, Teresa Harris, is a female citizen of the United States and the

State of Tennessee. At all times pertinent to this action, plaintiff has been a resident of Davidson County, Tennessee. Plaintiff was employed by Forklift as a Rental Manager from April 22, 1985, until October 1, 1987. At all times relevant, Charles Hardy was, and still is, President of Forklift.

Forklift is a Tennessee corporation with its principal place of business at 884 Elm Hill Pike, Nashville, Tennessee. Defendant is in the business of selling, leasing and repairing forklift machines. Defendant is an employer within the meaning of 42 U.S.C. § 2000(e).

Plaintiff was initially assigned responsibility for management of leased equipment and sales coordinator for the

sales department. Plaintiff earned \$13,796 in salary, commissions, and bonuses from April 22, 1985, through the end of 1985; \$30,024 in 1986; and \$26,051 through September 30, 1987.

Of the managers employed by Forklift during the period of plaintiff's employment, four were male and two were female. Other than plaintiff, the remaining female manager was Charles Hardy's daughter. During the time of plaintiff's tenure the Service Manager was Mike Moseley, Office Manager was Kathy Kernell, Parts Managers were John Garrett and then David Matthews, Sales Manager was Dick Read, and the Comptroller was Bennie Lawson.

Plaintiff was a manager paid on a base salary plus commission. All other managers

but one were paid strictly a base salary. The net result was that plaintiff was making more than all but one of the managers, Dick Read. Overall, plaintiff's compensation increased during her tenure at Forklift.

Plaintiff was treated and compensated differently from other male managers in the following respects: 1) she received a smaller bonus in 1987 than the Service Manager and Comptroller, both of whom were males; and 2) she was reimbursed for her travel expenses on a per mile basis while the other managers either received a company car or a monthly car allowance.

However, these discrepancies are attributable to factors other than sex discrimination. Bonuses were distributed

primarily on the basis of longevity. The three managers who had been employed at Forklift longer than plaintiff received larger bonuses than she did, and the one with less tenure than plaintiff, David Matthews, received less of a bonus than she did. An additional factor affecting bonus was compensation method; plaintiff and Mr. Matthews, the two managers with the lowest bonus, were on a commission plan, and thus had control over their income. The three managers on strictly a base salary plan were paid higher bonus.

Plaintiff was not afforded a company car nor did she receive a set car allowance, because the amount she drove her car for the company did not economically justify her receiving these benefits. The

Service Manager had a company car because he was on 24-hour call. The Sales Manager had a company car because he was responsible for sales in both Tennessee and Kentucky, and did a lot of driving. The Office Manager and Comptroller were paid a monthly car allowance because they did a lot of running around town and had high mileage, and so it was simpler for the company to give them a flat fee rather than have them keep track of their mileage. The Office Manager received a company car in 1987 because she was then required to travel to an office in Kentucky.

Plaintiff was initially denied a separate office when Forklift relocated its place of business in November, 1986. This was rectified after plaintiff complained to Charles Hardy.

On one occasion plaintiff was directed by Hardy to bring coffee into a meeting, a request which he did not make of male managers. Plaintiff was the object of a continuing pattern of sex-based derogatory conduct from Hardy, including the following:

(a) Hardy stated to plaintiff in the presence of other employees at Forklift, "You're a woman, what do you know," on a number of occasions during the period of plaintiff's employment, and "You're a dumb ass woman," at least once.

(b) Hardy, on a number of occasions, stated to plaintiff in the presence of other employees at Forklift, "We need a man as the rental manager."

(c) Hardy, in front of a group of other employees at Forklift and a Nissan factory representative stated to plaintiff, "Let's go to the Holiday Inn to negotiate your raise." However, plaintiff knew this was meant as a joke, and treated it as a joke at the time. This comment must be viewed in context of the fact that the company often conducted management meetings at a nearby Holiday Inn.

(d) Hardy asked plaintiff and other female employees, but not male employees of Forklift, to retrieve coins from his front pants pocket.

(e) Hardy threw objects on the ground in front of plaintiff and other female employees of Forklift, but not male employ

ees, and asked them to pick the object up, thereafter making comments about female employees' attire.

(f) Hardy commented with sexual innuendos about clothing worn by plaintiff and other female employees of Forklift, but not male employees.

Plaintiff testified that by August, 1987, she was experiencing anxiety and emotional upset because of Hardy's behavior. She did not want to go to work; she cried frequently and began drinking heavily; and her relationship with her children became strained.

Forklift had notice of the harassment. The harasser was President of the defendant company, and on August 18, 1987, plaintiff met with Hardy to complain about his treat

ment towards her. Plaintiff secretly taped a portion of this August 18th meeting with Hardy, and transcribed the tape herself. The transcription of the tape indicates that Hardy had no prior knowledge that plaintiff was offended by any of his conduct. During the meeting between plaintiff and Hardy, he admitted making some of the comments, but said they were "jokes." He also apologized and promised that his offensive behavior would cease. Based upon his assurances, plaintiff did not resign as she had threatened earlier in the meeting.

Shortly after the August 18th meeting, Hardy's offensive behavior began again. In early September, Hardy made a remark to plaintiff suggesting that she promised sexual favors to a customer in order to

secure an account: Hardy asked plaintiff in front of other employees of defendant, "What did you do, promise the guy at ASI (Alladin Synergetics, Inc.) some 'bugger' Saturday night?"

On Thursday, October 1, 1987, plaintiff collected her pay check and left her place of employment. On Friday, October 2, 1987, plaintiff met with her attorney; and on Monday, October 5, 1987, plaintiff filed her EEOC complaint.

Until that time plaintiff quit Forklift, a social relationship existed between Mr. and Mrs. Hardy and plaintiff and her husband. The couples went out together on more than one occasion. It appeared to plaintiff's co-workers that she had a good working relationship with themselves and

with Hardy. Plaintiff would sometimes drink beer with her co-workers after hours, and would join in the conversations, sometimes with coarse language.

Other females employed at Forklift were not offended by Hardy's vulgar sexual comments. Several clerical employees formerly employed at Forklift testified that Hardy's frequent jokes and sexual comments were just part of the joking work environment at Forklift. They were not offended, nor did they know that plaintiff was offended. Angela Hicks, formerly a receptionist at Forklift, aptly expressed her feelings about comments Hardy may have made about her body. Ms. Hicks jauntily testified, "lots of people make comments about my breasts."

Plaintiff was good at her job, and did not receive any substantial criticism from Hardy. Annual reviews at Forklift are informal. Plaintiff did not feel that her 1987 annual review was adequate, but there is no proof that other managers received a more thorough review than did plaintiff.

After plaintiff filed her EEOC complaint, Hardy went back into his desk calendar and plaintiff's personnel file and made some notes in order to manufacture a justification for her termination. Albert Lyter, a forensic chemist experienced in ink pen chemical analysis, testified that Hardy probably made the notations in his desk calendar and personnel file on some date after January 1, 1988. These notes indicate that Hardy was considering termi

nating plaintiff because she could not get along with the receptionist. In fact, former receptionists testified that they had no real problems with plaintiff. There is no credible proof that Hardy was ever dissatisfied with plaintiff's job performance or ever intended to fire her.

Hardy and plaintiff's husband, Larry Harris, had a business relationship during the time of plaintiff's employment at Forklift. Larry Harris' business, Cellular Power, sold batteries to Forklift for use in the forklift machines. On October 7, 1987, Forklift canceled its account with Cellular Power. The cancellation occurred orally in a phone conversation between Larry Harris and Hardy's secretary, Stepha

nie Vanns, and was confirmed by a letter from Ms. Vanns to Mr. Harris dated October 7, 1987.

Larry Harris owed Hardy money on a loan, which Harris had used to finance Cellular Power. After Forklift canceled its account with Cellular Power, Hardy stopped making payment on the note and Hardy sued Harris in state court.

CONCLUSIONS OF LAW

Assignment of credibility was difficult in this case. Defendant attempted to show that the sole reason plaintiff quit at Forklift was because Hardy terminated Forklift's account with Cellular Power. Hardy testified that the business relationship between himself and Mr. Harris had

been deteriorating for some time, and that he informed Harris that his account was terminated in late September, prior to the date plaintiff walked off the job. Plaintiff testified that she had no information that the business relationship was deteriorating, and that it was the norm for Hardy to do business with her husband's competitors as well as her husband. Larry Harris also testified that he had no knowledge the relationship was deteriorating until the account was terminated by Stephnie Vanns on October 7th.

I am certain that Hardy's business relationship with plaintiff's husband played more of a role in plaintiff's dissatisfaction with her job than plaintiff admitted. Business relationships rarely

deteriorate just like that, especially between social friends and in light of Hardy's financial interest in Cellular Power. It must have been a financial blow to Cellular Power to lose the Forklift account, and I do not doubt that plaintiff had some bitter feelings towards Hardy over this.

However, I do not assign much credibility to Charles Hardy. Hardy's credibility is damaged by the proof that after plaintiff left Forklift, Hardy went into his desk calendar and doctored it up to make it look as if he was displeased with plaintiff's job performance. Furthermore, plaintiff's version of the facts regarding the timing of the breakdown of Forklift's relationship with Cellular Power is corrob

orated by a letter from Stephine Vanns to Larry Harris dated October 7th, indicating that the Cellular Power account was not terminated until that date. See Plaintiff's Exhibit 10. Thus, it is just as likely that Charles Hardy cut the business relationship with Cellular Power because plaintiff quit and filed the EEOC charge as it is likely that plaintiff quit because of the deteriorating business relationship. I will thus discount defendant's theory of this case, and examine whether the proof bears out plaintiff's allegations of Title VII violations.

I believe that Hardy is a vulgar man and demeans the female employees at his work place. Many clerical employees tolerate his behavior and, in fact, view it as

the norm and as joking. Plaintiff presented no testimony from other female Forklift employees indicating that they found Hardy's behavior to be offensive or that a hostile work environment existed. This does not mean, however, that plaintiff, a managerial employee, took it the same way. In fact, I believe she did not. She believed that Hardy's sexual comments undermined her authority; this was especially painful when Hardy would make demeaning sexual comments to plaintiff in front of her co-workers. Why plaintiff kept this to herself until August 18, 1987, I do not know.¹ Plaintiff denies that she did, but

¹I do not assign much credibility to the testimony of Dick Read, who stated that plaintiff did express her displeasure to Hardy prior to this date. Dick Read was terminated from Forklift and I believe he still holds quite a grudge against Hardy. He has testified for the Harris' against Hardy in prior State court litigation regarding Cellular Power and the promissory note.

the tape plaintiff made of the private August 18th meeting between herself and Hardy reveals that prior to this date Hardy really did not know that plaintiff viewed his conduct as other than joking.

I conclude that plaintiff was not able to prove that Hardy's conduct was so severe as to create a hostile work environment for plaintiff at Forklift. Nor was plaintiff able to show that she was treated disparately as to other terms or conditions of employment. Thus, I recommend that plaintiff's Title VII claims be dismissed.

Hostile Work Environment

Plaintiff makes several claims that she was subjected to disparate treatment in regard to the terms and conditions of her

employment. One of the conditions about which plaintiff complains is a sexually hostile work environment.

Sexual harassment which creates a hostile work environment is discrimination on the basis of sex within the meaning of Title VII. Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399, 91 LEd.2d 49 (1986). Sexual harassment includes "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." 29 C.F.R. § 1604.11a (1985), quoted in Vinson, 477 U.S. at 65. Sexual harassment is actionable under Title VII whether or not it results in economic injury to the victim, where "such conduct has the purpose or effect of

unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment." Id. A hostile working environment exists where sexual harassment is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Id. at 67.

In the Sixth Circuit, the test for whether or not sexual harassment rises to the level of a hostile work environment is whether the harassment is "conduct which would interfere with that hypothetical reasonable individual's work performance and affect seriously the psychological well-being of that reasonable person under

like circumstances." Rabidue v. Osceola Refining Company, 805 F.2d 611, 620 (6th Cir. 1986). The plaintiff must also prove that her injury "resulted not from a single or isolated offensive incident, comment, or conduct, but from incidents, comments, or conduct that occurred with some frequency." Id. Once the objective "reasonable person" test is met, the court must next determine if the victim was subjectively offended and suffered an injury from the hostile work environment. Id. See also Highlander v. K.F.C. National Management Co., 805 F.2d 644, -650 (6th Cir. 1986).

The elements of a cause of action for hostile work environment discrimination under Title VII are:

- (1) the employee was a member of a protected class; (2) the employee was

subjected to unwelcomed sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based upon sex; (4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance in creating an intimidating, hostile or offensive working environment that affected seriously the psychological well-being of the plaintiff, and (5) the existence of respondeat superior liability.

Rabidue, 805 F.2d at 619-620.

Here, there is no question but that elements one, three and five are fulfilled. Teresa Harris is a woman, and thus a member of a protected class; there is no proof that male employees of Forklift were subjected to the conduct complained of by plaintiff; and Charles Hardy, the party allegedly responsible for committing the sexual harassment, is President of the

company, thus eliminating the issue of respondeat superior liability.

I also believe that element two is fulfilled; Charles Hardy really did not deny that he made the sexually crude comments complained of by plaintiff. His excuse is that he thought of his conduct as joking, and up until August 18, 1987, he thought plaintiff thought so too. The disputed issue involves element four, that is, whether Hardy's continuous inappropriate sexual comments rose to the level of creating a hostile work environment.

I believe that this is a close case, but that Charles Hardy's comments cannot be characterized as much more than annoying and insensitive. The other women working at Forklift considered Hardy a joker. Most

of Hardy's wisecracks about females' clothes and anatomy were merely inane and adolescent, such as the running joke that large breasted women are that way because they eat a lot of corn. Hardy's coin dropping and coin-in-the-pocket tricks also fall into this category. I appreciate that plaintiff, as a management employee, was more sensitive to these comments than clerical employees, who it appears were conditioned to accept denigrating treatment.

At trial, plaintiff tried to get far too much mileage out of Hardy's comment that they would negotiate her raise at the Holiday Inn. The comment shows Hardy to be a man with a bad sense of humor, but it was not a sexual proposition. Plaintiff took

the comment as a joke at the time and knew that it stemmed from the fact that management meetings were often conducted at the Holiday Inn. Hardy's comments to plaintiff that she was a "dumb ass woman," and "you're a woman, what do you know," were more objectionable. Hardy's comment to plaintiff suggesting that she promised sexual favors to a customer in order to secure an account was truly gross and offensive. However, it should be noted that this comment was not made in front of a client, but in front of other employees at Forklift.

I believe that some of Hardy's inappropriate sexual comments, especially this last one, offended plaintiff, and would offend the reasonable woman. However, I do

not believe they were so severe as to be expected to seriously affect plaintiff's psychological well-being. A reasonable woman manager under like circumstances would have been offended by Hardy, but his conduct would not have risen to the level of interfering with that person's work performance.

Neither do I believe that plaintiff was subjectively so offended that she suffered injury, despite her testimony to the contrary. Plaintiff repeatedly testified that she loved her job. She and her husband socialized with Hardy and his wife, and plaintiff often drank beer and socialized with Hardy and her co-workers. Plaintiff herself cursed and joked and appeared to her co-workers to fit in quite well with

the work environment. The channels of communication were open between plaintiff and Hardy, but plaintiff was not inspired to broach the issue with him until she had been working at Forklift for over two years. Although Hardy may at times have genuinely offended plaintiff, I do not believe that he created a working environment so poisoned as to be intimidating or abusive to plaintiff.

It is helpful to compare the instant case to Rabidue, wherein the Sixth Circuit plaintiff was not the victim of a hostile work environment. In Rabidue, the plaintiff was subjected to a pattern of sexual harassment by a co-worker who "customarily made obscene comments about women generally, and, on occasion, directed such obscen

ities to the plaintiff." 805 F.2d at 615. This annoyed the plaintiff as well as her female co-workers. On top of this, several co-workers displayed pictures of naked women about the work area. In finding that the plaintiff was not subjected to a hostile work environment remediable under Title VII, the Sixth Circuit noted that cases recognizing a violation of Title VII were based on a pattern of sexual harassment more egregious than that complained of by plaintiff. Id. at 622, n. 7. These cases involved sexual harassment directed at the plaintiff for a period of time by more than one fellow employee, in the form of requests for sexual relations or actual offensive touching. Id.

I find that the degree of sexual hostility that existed in Teresa Harris' work environment was comparable to that in Rabidue. In both cases, the perpetrator of the offensive conduct was chiefly one person. He was vulgar and crude, but the sexual conduct was not in the form of sexual propositions or physical touching. It is true that Ms. Harris' nemesis was her supervisor and owner of the company, whereas Ms. Rabidue's was merely a co-worker. However, Ms. Rabidue was able to show that the offensive conduct was severe enough to annoy her female co-workers, which Ms. Harris has been unable to show.

Constructive Discharge

As plaintiff has not shown that she

was subjected to a hostile work environment, neither can she show that she was constructively discharged. An employee is not constructively discharged unless she can show that a reasonable person in her shoes that is subjected to the same working conditions would have found the working conditions so unpleasant that she would have felt compelled to resign. Wheeler v. Southland Corp., 875 F.2d 1246, 1249 (6th Cir. 1989); see also Yates v. AVCO Corp., 819 F.2d 630 (6th Cir. 1987). Further, she must show some proof of intent on the part of the employer that the environment would cause her to resign. 875 F.2d at 1249. Intent can be shown by proof that circumstances were so unpleasant that it was reasonably foreseeable to the employer that

the plaintiff would resign. This is based on the precept that a person is held to intend the foreseeable consequences of his or her conduct. This intent factor is usually shown by proof of some "aggravating factor," in addition to the proof of discrimination alone.

The undersigned is moved by the fact that after plaintiff spoke with Hardy on August 18th, thus making him aware that his sexual comments were not jokes to her, Hardy did not stop altogether. The proof showed that he stopped for awhile, but then made the crude "promised him some 'bugger'" comment. However, since things were just annoying and not that bad before, I do not believe that this additional comment created foreseeability that plaintiff would in

fact, resign. It would, of course, create foreseeability that plaintiff would again speak with Charles Hardy or reprimand him sharply at the time of the comment. It would not drive a reasonable person, even a reasonable female manager, to quit.

Other Terms and Conditions of Employment

In addition to the hostile work environment, plaintiff brings a claim of disparate treatment in terms of her pay, bonus, car allowance and failure to receive a 1987 annual review. The proof does not bear out plaintiff's claims of disparate treatment in these particulars.

As set forth in McDonnell Douglas Corp., v. Green, 411 U.S. 792 (1973), the basic allocation of burden of proof in a

Title VII case is as follows: First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff is successful in proving a prima facie case, the burden shifts to the defendant "to articulate some legitimate, non-discriminatory reason for the employee's termination or rejection." Id., at 802. Third, should the defendant carry this burden, the plaintiff must then prove by a preponderance of the evidence that the reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. Id. In order to show that the articulated reason is a pretext, the plaintiff may either show that a discriminatory reason was the more likely motiva

tion or that the articulated reason is unworthy of belief. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 716 (1983).

Plaintiff simply was not paid less than her male co-managers, and has thus failed to set forth in a prima facie case of discrimination because she was not treated disparately. The elements of a prima facie case vary according to the specific factual situation, but, at a minimum, plaintiff must show she was treated differently from similarly situated males. See e.g., Texas Department of Community Affairs v. Burdine, 500 U.S. 248, 253 (1981). To establish a claim of unequal pay under Title VII, "plaintiff must show that different wages were paid to

employees of opposite sexes for substantially equal work." Henry v. Lennox Industries, Inc., 768 F.2d 746, 752 (6th Cir. 1985).

Nor was plaintiff able to show that her failure to receive a formal 1987 annual review was an example of disparate treatment. Plaintiff felt that her 1987 annual review was cursory, but she could not show that some similarly situated male employees were treated more favorably.

Defendants articulated a legitimate, non-discriminatory reason for providing plaintiff with a different form of car allowance and a lesser bonus than her co-worker managers. She was reimbursed on a mileage basis rather than a flat rate or having a company car because she did not

drive around town as often as other managers, or drive to Kentucky. She received less of a bonus than other managers because she had not worked at Forklift as long, and because her salary was based partially on commission and was thus under her control. She received more of a bonus than the other manager who had worked less time than she. Plaintiff did not offer any evidence that Forklift's proffered reasons for the differential bonus and car allowance treatment are unworthy of credence. Plaintiff has simply failed to raise an inference of discriminatory intent, a crucial element of proof in a Title VII case brought under the disparate treatment theory. Grano v. The Department of Development of the City of Columbus, 637 F.2d 1073, 1081 (6th Cir.

1980). I thus concede that these legitimate, non-discriminatory reasons were not pretext.

RECOMMENDATION

The undersigned recommends that plaintiff's Title VII claims be DISMISSED.

The undersigned further recommends that each party bear its own cost. An award of attorney's fees to a prevailing party is within the District Court's discretion, and there is no evidence to indicate that the defendant in this case is financially unable to assume these fees, that plaintiff's claim is frivolous, unreasonable or groundless, or that plaintiff

pursued the action in bad faith. Christia-
nburg Garment Co. v. EEOC, 434 U.S. 412
(1978); Torres v. County of Oakland, 758
F.2d 147 (6th Cir. 1985).

ANY OBJECTIONS to this Report and
Recommendation must be filed with the Clerk
of Court within ten (10) days of receipt of
this notice, and must state with particu-
larity the specific portions of this Re-
port, or the proposed findings or recommen-
dation to which objection is made. Failure
to file objections within the specified
time waives the right to appeal the Dis-
trict Court's Order. See Thomas v. Arn,
474 U.S. 140 (1985); United States v.
Walters, 638 F.2d 947 (6th Cir. 1981).

Respectfully submitted,

/s/ Ken Sandidge, III
United States Magistrate

FILED: November 27, 1990
Leonard E. Bush
Deputy Clerk

No. 92-1168

Supreme Court, U.S.
FILED

JAN 21 1993

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1992

TERESA HARRIS,

Petitioner,

v.

FORKLIFT SYSTEMS, INC.

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Teresa Harris, a four-time married white female, filed this suit alleging basically that her employer's President, Charles Hardy maintained a hostile working environment for females resulting in her constructive discharge. There was also an allegation that she was employed on different terms and conditions from other male managers.

The period of Harris' employment was from August 22, 1985 until October 1, 1987, at which time she collected her paycheck and left her place of employment without proper notice, and did not return. On Friday, October 2, 1987, Harris met with her attorney, and on Monday, October 5, 1987 filed her EEOC complaint.

During the time of her employment, Harris voluntarily, on a frequent two to three times a week basis, participated in after hour "bull sessions" where she was the only female participant. During these sessions beer was drunk, dirty jokes were swapped, and off-color language employed.

These activities never yielded, on the part of Harris, an objection in any shape, manner or form.

The facts establish that she conducted herself as "one of the boys", enjoyed the camaraderie, and at times utilized language, herself, that sank below the generally accepted norm.

Harris never complained to Hardy of the facts that she sought to utilize as the basis of the lawsuit, until August, 1987. In August, 1987, a business relationship between Harris' husband and Hardy began to deteriorate.

The facts evidence that Harris' compensation increased during her period of employment; that a social relationship existed between Harris and Mr. and Mrs. Hardy; and that prior to her departure from her employment she was planning to open a business in competition with her employer.

The proof established that shortly before her departure, Harris secretly taped a conversation between herself and Hardy. Harris did not introduce the transcript of the tape into evidence, and when Hardy utilized the transcript for purposes of cross-examination of Harris, Harris' counsel unsuccessfully sought the exclusion of the contents of the tape. The tape, utilized in the cross-examination of Harris, established a multitude of facts that justified the recommendation that her case be dismissed.

In the ruling below, the District Court in adopting the Magistrate's Report and Recommendation found that assignment of credibility was difficult. It found that Hardy's business relationship with Harris' husband played a bigger role in Harris' dissatisfaction with her job than she admitted.

The Court concluded that Harris was not able to prove that Hardy's conduct was so severe as to create a hostile work environment for Harris, nor that she was treated disparately as to other terms or conditions of employment.

The Court also concluded that it did not believe that Harris was so offended that she suffered injury, despite her testimony to the contrary.

ARGUMENT IN OPPOSITION

Each hostile environment action must be decided individually on a consideration of all the facts in the case. *Meritor Savings Bank vs. Vinsion*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986).

The facts in this case clearly established that Harris voluntarily placed herself in situations that she complained of; that she waited two years to complain and then only at the time when the business relationship between her husband and Hardy was being terminated; and that during her employment her compensation increased and that she was happy with her compensation.

The lower court properly concluded that Harris failed to establish a hostile work environment; failed to establish that she was treated disparately; and failed to establish that she suffered any type of injury.

Harris' case failed with, or without consideration of her psychological well-being.

CONCLUSION

For the foregoing reasons and based on the uncontroverted facts this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

October Term, 1992

TERESA HARRIS,

Petitioner,

vs.

FORKLIFT SYSTEMS, INC.,

Respondent.

On Writ of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

JOINT APPENDIX

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**Petition for Writ of Certiorari Filed December 15, 1992
Certiorari Granted March 1, 1993**

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RELEVANT DOCKET ENTRIES

<u>Record Entry No.</u>	<u>Date</u>	<u>Designation of Entry</u>
R. 1	July 7, 1989	Complaint
R. 3	July 26, 1989	Answer
R. 53	July 23, 1990	Pretrial Order
R. 38	July 23, 1990	Transcript of Proceedings, Vol. I
R. 39	July 23, 1990	Transcript of Proceedings, Vol. II
R. 40*	November 27, 1990	Magistrate's Report and Recommendation

* Printed in the Petition for Writ of Certiorari

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

TERESA HARRIS,)	
Plaintiff)	
vs.)	No. <u>389 0557</u>
FORKLIFT SYSTEMS, INC.,)	JUDGE NIXON
Defendant)	

COMPLAINT

(Filed July 7, 1989)

Jurisdiction and Venue

1. This Complaint is an action for declaratory, injunctive and other appropriate relief, including back pay, costs, and attorney's fees, to redress the deprivation of rights secured by the Plaintiff by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e), *et seq.* (hereinafter Title VII).

2. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by Title VII providing for injunctive and other relief against discrimination in employment on the basis of sex. This Court has jurisdiction of this action under 42 U.S.C. §2000(e)-5(f)(3).

Parties

3. Plaintiff, Teresa Harris, is a female citizen of the United States and the State of Tennessee. At all times material herein, Plaintiff has been a resident of Davidson

County, Tennessee and has resided in the judicial district of this Court. Plaintiff was an active employee of the Defendant Forklift Systems, Inc. from the date of her employment in April, 1985 until October, 1987.

4. Defendant Forklift Systems, Inc. (hereinafter "Defendant" or "Forklift") is a Tennessee corporation with its principal place of business at 884 Elm Hill Pike, Nashville, Tennessee. Defendant is in the business of selling, leasing and repairing forklift machines. Defendant is an employer within the meaning of 42 U.S.C. §2000(e)-(b).

Administrative Procedure

5. Within one hundred eighty (180) days of the occurrence of the acts set forth herein, charges of employment discrimination were filed by Plaintiff herein against Defendant, a copy of which is attached hereto as Exhibit A.

6. On April 10, 1989, "Notice of Right to Sue" was issued from the District Office of the Equal Employment Opportunity Commission (a copy of which is attached hereto as Exhibit B), entitling her to institute a civil action in the appropriate Federal District Court within ninety (90) days of the date of receipt of said notice.

Factual Allegations

7. Plaintiff was employed by Defendant effective April 22, 1985. She was initially assigned responsibility for management of leased equipment and sales coordinator for the sales department.

8. As of the date of her employment, the Defendant employed six managers in addition to the Defendant owner, Charles Hardy. Of the six managers, four were male. The remaining female manager was Charles Hardy's daughter.

9. According to the Defendant's personnel handbook, all employees are to be evaluated on an annual basis.

10. Plaintiff did not receive any evaluation of her job performance in 1987 as contemplated by the Defendant's personnel policies.

11. Plaintiff alleges on information and belief that the male managers received a job performance evaluation in 1987.

12. Plaintiff was the object of a continuing pattern of sexual harassment and derogatory conduct from Charles Hardy, President of Forklift Systems, Inc., including but not limited to the following:

(a) Charles Hardy stated to Plaintiff in the presence of other employees of Defendant, "You're a woman, what do you know?" on a number of occasions during the period of Plaintiff's employment, and "You're a dumb-ass woman" at least once.

(b) Charles Hardy, on a number of occasions, stated to Plaintiff in the presence of other employees of Defendant, "We need a man as rental manager."

(c) Charles Hardy, in front of a group of other employees of Defendant and the Nissan

factory representative stated, "Let's go to the Holiday Inn to negotiate your raise."

(d) Charles Hardy has asked Plaintiff and other female employees but not male employees of Defendant to retrieve quarters from his front pants pocket.

(e) Charles Hardy has thrown objects on the ground in front of Plaintiff and other female employees of Defendant but not male employees and asked them to pick the object up thereafter making comments about female employees' attire.

(f) Charles Hardy, on one occasion, asked Plaintiff in front of other employees of Defendant, "What did you do, promise the guy at ASI (Alladin Synergetics, Incorporated) some bugger Saturday night?"

(g) Charles Hardy commented with sexual innuendos [sic] about clothing worn by Plaintiff and other female employees but not male employees of Defendant.

13. The acts alleged in paragraph 12 were directed to Plaintiff because she was a female.

14. The acts of Defendant by and through Charles Hardy interfered with Plaintiff's work and caused Plaintiff to suffer lack of self-esteem, and physical and emotional distress.

15. On or about August 17, 1987, Plaintiff met with Charles Hardy to complain to him of the acts set forth herein.

16. During the course of said meeting Charles Hardy admitted to many of the actions, stated they were only "jokes," and promised they would not be repeated.

17. Sometime thereafter the actions complained of by Plaintiff to Charles Hardy as alleged herein commenced again.

18. The acts of Charles Hardy created a hostile work environment characterized by sexual harassment.

19. On or about October 1, 1987, Plaintiff ceased her employment with Defendant because of the hostile work environment created by the sexual harassment of Charles Hardy.

Prayer for Relief

WHEREFORE, Plaintiff respectfully prays the Court to:

1. Issue this Complaint and require the Defendant to answer within the time prescribed by law;

2. Issue a declaratory judgment that Defendant's acts, practices and procedures complained of herein violated Plaintiff's right as secured under Title VII;

3. Grant Plaintiff a permanent injunction enjoining Defendant, its officers, agents, successors, employees, attorneys, assigns and other representatives, and all those acting in concert or participation with them and at their direction, from engaging in any employment policy or practice shown to discriminate against the Plaintiff, in violation of Title VII, on the basis of sex;

4. Grant Plaintiff back pay, reinstatement and reimbursement for lost fringe benefits, training and promotional opportunities and other appropriate relief to redress the discriminatory practices complained of herein;

5. Retain jurisdiction over this action to assure full compliance with the orders of this Court and with applicable law;

6. Grant Plaintiff her costs, attorney's fees and disbursements; and

7. Grant such additional relief as the Court deems proper and just.

Respectfully submitted,
WOODS & WOODS
A Professional Law
Association

By: /s/ Irwin Venick
Irwin Venick, #4112

121 Seventeenth Avenue South
Nashville, Tennessee 37203
(615) 259-4366

/s/ Lawrence Wilson
LAWRENCE D. WILSON, #

One Burton Hills Boulevard
Suite 220
Nashville, Tennessee 37215
(615) 665-9075

Counsel for Plaintiff

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

TERESA HARRIS, being first duly sworn before the undersigned authority, deposes and says that she is the Plaintiff in the foregoing [sic] action, that she has read the foregoing Complaint and it is true and correct to the best of her knowledge, information and belief.

/s/ Teresa Harris
TERESA HARRIS

Sworn to and subscribed before me this 7 day of July, 1989.

/s/ Karilyn Illegible
Notary Public

My commission expires:

7-18-92

EXHIBIT A

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing this form.

ENTER CHARGE NUMBER

FEPA
XX EEOC
DIN0290-88
253-88-0007

TENNESSEE HUMAN RIGHTS COMMISSION and EEOC
(State or local Agency, if any)

NAME (Indicate Mr., Ms., or Mrs.)

Teresa G. Harris

HOME TELEPHONE NO. (Include Area Code)

(615) 331-5784

STREET ADDRESS

5501 Tudor Lane

CITY, STATE AND ZIP CODE

Nashville, Tennessee 37211

COUNTY

Davidson

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATION AGAINST ME (If more than one list below.)

NAME

Forklift Systems

NO. OF EMPLOYEES/MEMBERS

15+

TELEPHONE NUMBER (include Area Code)

(615) 255-6321

STREET ADDRESS

884 Elm Hill Pike

CITY, STATE AND ZIP CODE

Nashville, Tn 37210

NAME

TELEPHONE NUMBER (Include Area Code)

STREET ADDRESS

—
CITY, STATE AND ZIP CODE

—
CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es))

— RACE
— COLOR
XX SEX
— RELIGION
— NATIONAL ORIGIN
— AGE
— RETALIATION
— OTHER (Specify)

DATE MOST RECENT OF CONTINUING
DISCRIMINATION TOOK PLACE

(Month, day, year)

100187

THE PARTICULARS ARE (If additional space is needed,
attached extra sheet(s)):

- I. On October 1, 1987, I was forced to quit my job as a Rental Manager. Prior to quitting, I had been denied performance reviews, subjected to general and sexual harassment by the company's owner and paid upon a different basis from the other managers. I had been employed by the company since April 1985. The company employs more than 15 employees.
- II. I was never given an explanation by the company for having been treated in this manner.
- III. I believe that I was discriminated against because of my sex-Female.

— I also want this charge filed with the EEOC. I will advise the agencies if I change my address or telephone

number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

NOTARY - (When necessary to meet State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Date 10/5/87 /s/ Teresa G. Harris
Charging Party (Signatures)

SIGNATURE OF COMPLAINT

/s/ Teresa G. Harris
SUBSCRIBED AND SWORN TO
BEFORE ME THIS DATE
(Day, month, and year)

EXHIBIT B

(SEAL)

STATE OF TENNESSEE
HUMAN RIGHTS COMMISSION
CHATTANOOGA REGIONAL OFFICE
540 McCALLIE AVENUE
6th FLOOR WEST #605
CHATTANOOGA, TENNESSEE 37402
(615) 622-6234

In Reply Refer to:

Charge No:

THRC: DIN-0290-88

EEOC: 253-88-0007

Ms. Teresa G. Harris
5501 Tudor Lane
Nashville, Tennessee 37211

Complainant

Mr. Charles Hardy
FORKLIFT SYSTEMS
884 Elm Hill Pike
Nashville, Tennessee 37210

Respondent

NOTICE OF ADMINISTRATIVE CLOSURE

This is to advise all parties that this case has been administratively closed by this agency as the Complainant has requested an Equal Employment Opportunity Commission (EEOC) Right To Sue Letter.

On Behalf of the Commission:

4-10-89

Date

/s/ W.N. Moore by Illegible

Warren N. Moore,

Executive Director

cc: Mr. Stanley M. Chernau
DENNY, LACKEY AND CHERNAU
218 Third Avenue, North
P. O. Box 3429
Nashville, Tennessee 37219-0429

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO: Teresa G. Harris
5501 Tudor Lane
Nashville, TN 37211

— On behalf of a person aggrieved whose identity is
CONFIDENTIAL (29 C.F.R. 1601.7(a)).

FROM:

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
1407 UNION AVENUE SUITE 621
MEMPHIS, TN 38104

CHARGE NUMBER

253-88-0007

EEOC REPRESENTATIVE

Vernell C. Neely, Deferral Cord.

TELEPHONE NUMBER

(615) 736-5820

(See the additional information on the reverse side of this form.)

TO THE PERSON AGGRIEVED:

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge, YOU MUST DO SO WITHIN NINETY (90) DAYS OF YOUR RECEIPT OF THIS NOTICE: OTHERWISE YOUR RIGHT TO SUE IS LOST.

- ☐ More than 180 days have expired since the filing of this charge.
- ☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its process within 180 days from the filing of the charge.
- ☒ With the issuance of this Notice of Right to Sue, the Commission is terminating its process with respect to this charge.
- ☐ It has been determined that the Commission will continue to investigate your charge.
- ☐ ADEA - While Title VII requires the Commission to issue a Notice of Right to Sue before you can bring suit under that law, you obtained the right to sue under the Age Discrimination in Employment Act (ADEA) when you filed your charge, subject to a 60-day waiting period. ADEA suits must be brought within 2 years (3 years in cases of willful violations) of the alleged discrimination.
- ☐ EPA - While Title VII requires the Commission to issue a Notice of Right to Sue before you can bring suit under that law, you already have the right to sue under the Equal Pay Act (EPA) (you are not required to complain to any enforcement agency before bringing an EPA suit in court). EPA suits must be brought within 2 years (3 years in cases of willful violations) of the alleged EPA underpayment.

An information copy of this Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission
cc: (to respondent)

☐ Copy of Charge

Mr. Charles Hardy
Forklift Systems
884 Elm Hill Pike
Nashville, TN 37210

/s/ Illegible

TYPED NAME AND TITLE
OF ISSUING OFFICIAL

DATE

W. S. Grabon, District Director

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

TERESA HARRIS,)	
Plaintiff,)	
vs.)	No. 3-89-0557
FORKLIFT SYSTEMS, INC.,)	JUDGE NIXON
Defendant.)	

ANSWER OF DEFENDANT, FORKLIFT SYSTEMS, INC.

Comes the Defendant Forklift Systems, Inc. and would respectfully answer the complaint as follows:

1. Paragraphs 1 through 6 of the complaint are admitted.
2. The allegations of paragraph 7 are admitted except for the allegation that plaintiff acted as a sales coordinator which is denied.
3. The allegations of paragraph 8 and paragraph 9 of the complaint are admitted.
4. The allegations of paragraph 10 are denied because Plaintiff received a job performance evaluation in 1987 just as all other managers received. Defendant would show that this is not a formal process but takes place through an informal discussion by and between the chief executive officer of the corporation and the employee.
5. The allegation in paragraph 11 is admitted due to the fact that all managers, including Plaintiff, did receive a job performance evaluation in 1987.

6. Each and every allegation of the subparagraphs contained in paragraph 12 of the complaint are denied and the substance of each of the allegations contained in said subparagraphs have been dealt with by affidavits filed with the Office of the EEOC by various other employees of Defendant and said affidavits are in the possession of Plaintiff's counsel.

7. The allegation of paragraph 13 is denied as explained in Defendant's answer to paragraph 12 of the complaint.

8. The allegation of paragraph 14 is denied.

9. The allegation of paragraph 15 is denied in that the meeting referred to took place on August 18th, 1987, and was a meeting that took place at the request of Defendants' CEO advising Plaintiff that her attitude in regard to other employees must change or that she would be terminated since her behavior had been both abusive and impolite to her fellow employees.

10. The allegation in paragraph 16 is denied in that it alleges that the meeting of August 17, 1987, was a meeting wherein Mr. Hardy admitted that his actions were only "jokes". Defendant would show that a subsequent meeting was had with Plaintiff and Mr. Hardy and that at this meeting Plaintiff had secretly recorded a conversation had by and between herself and Mr. Hardy and it is the taped transcript of the subsequent meeting, not the August meeting, that Plaintiff obviously refers to.

11. The allegations of paragraphs 17 and 18 are denied.

12. The allegation contained in paragraph 19 is denied and it is respectfully submitted by Defendant that Plaintiff ceased her employment with Defendant not because of a hostile work environment but because of a terminated business relationship by and between the company owned by Plaintiff's husband known as Cellular Power Systems, Inc. and Defendant. Defendant will show by clear and convincing proof that Plaintiff's husband's company, Cellular Power Systems, Inc., had done business with Defendant and that said business was terminated giving rise to two (2) lawsuits filed by Plaintiff's husband's company against Defendant, one of which has been disposed of in the Chancery Court for Davidson County, Tennessee, under Docket Number 87-28-24-1 and the other now pending in the General Sessions Court under Docket Number 89GC20492.

Now having fully answered, this Defendant prays that it be hence dismissed with it's [sic] costs.

Respectfully submitted,

DENNEY, LACKEY & CHERNAU

By: /s/ Stanley M. Chernau
 STANLEY M. CHERNAU
 Sup. Ct. Reg. No. 2390
 218 Third Avenue, North
 P.O. Box 3429
 Nashville, TN 37219-0429
 (615) 244-5480

ATTORNEY FOR DEFENDANT,
 FORKLIFT SYSTEMS, INC.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer of Defendant, Forklift Systems, Inc., was served upon Irwin Venick, Esq., Woods & Woods, 121 17th Avenue, South, Nashville, Tennessee 37203, and upon Lawrence D. Wilson, Esq., 1 Burton Hills Boulevard, Suite 220, Nashville, Tennessee 37215, by United States Mail, First Class, postage prepaid, on the 25th day of July, 1989.

/s/ Stanley M. Chernau
 Stanley M. Chernau

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

TERESA HARRIS,)	
)	No. 3:89-0557
Plaintiff)	(Nixon/Sandidge)
vs.)	
FORKLIFT SYSTEMS, INC.,)	
)	
Defendant)	

PRETRIAL ORDER

1. This Court has jurisdiction over this cause pursuant to 42 U.S.C. §2000E-5(f)(3).
2. The pleadings are amended to conform to the Pretrial Order.
3. *Plaintiff's Theory:* The Plaintiff claims that she was constructively discharged by Defendant because of a sexually hostile environment in violation of the Civil Rights Act of 1964, 42 U.S.C. §2000(e). Defendant's President maintained and condoned a workplace environment demeaning to women generally, and Plaintiff in particular.

Plaintiff also claims that Defendant treated Plaintiff differently than it treated males in management positions with regard to the terms and conditions of employment.

The proof will show that Charles Hardy, Defendant's President, threw coins in front of female employees to retrieve, asked female employees to retrieve coins from his front pants pockets, and make sexually suggestive comments about the clothes of female employees.

Mr. Hardy also questioned Plaintiff's ability to be a manager, because of her sex, in manager meetings and had her perform secretarial type duties, neither of which was done with respect to male employees.

Mr. Hardy made a sexually suggestive statement about Plaintiff's raise in front of other males and suggested she offered sexual favors to secure business for the Company.

The hostile environment engendered by Mr. Hardy caused Plaintiff physical illness and anxiety necessitating a physician's care.

The proof will also show that Plaintiff did not receive an annual review in 1987 which other male managers received, did not receive a car allowance comparable to other male managers, did not receive a bonus in 1987 comparable to that of other male managers, was not paid on a comparable basis with other managers, and was told by Mr. Hardy that she made too much money for a woman.

In August, 1987, Plaintiff discussed her complaints about Mr. Hardy's behavior with him during which he stated he would discontinue the objectionable behavior. However, the behavior began again in mid-September, 1987. Plaintiff ceased working at Defendant on October 1, 1987.

4. *Defendant's Theory:* It is Defendant's theory that Plaintiff instituted this action out of vindictiveness arising from a terminated business transaction between her husband and Charles Hardy, CEO of Defendant. It is further Defendant's theory that Plaintiff worked for

Defendant from April, 1985 until October, 1987 during which time she conducted herself in a manner that encouraged and welcomed her being treated as "one of the boys."

Defendant's theory is that Plaintiff worked without complaint or notice of her alleged displeasure in the alleged hostile work environment from April, 1985 until August, 1987, when she secretly taped a conversation with Mr. Hardy wherein she made various complaints, the timing of which coincided with the business conflict between her husband and Mr. Hardy.

Defendant asserts that a friendship existed between the Plaintiff and Mr. and Mrs. Hardy and but for the conflict between Plaintiff's husband and Defendant that arose in 1987 this case would not be before the Court.

5. Stipulation of Facts:

(a) Plaintiff was employed by Defendant from April 22, 1985 through October 1, 1987.

(b) Plaintiff was a rental manager.

(c) Of the managers employed by Defendant between April, 1985 and October, 1987, four were male: John Garrett, David Matthews, Mike Moseley, and Dick Read; and two were female: Teresa Harris and Kathy Kernell. Kathy Kernell is Charles Hardy's daughter.

(d) Charles Hardy was the President of Forklift Systems, Inc. during the period April 22, 1985 through October 1, 1987.

(e) Plaintiff ceased employment with Forklift Systems, Inc. on October 1, 1987.

(f) Defendant did not have a sexual harassment policy in effect between April 22, 1985 and October 1, 1987.

(g) The personnel files maintained by the Defendant are authentic.

(h) The payroll records maintained by the Defendant are authentic.

(i) Forklift Systems, Inc. and Forklift Leasing Corporation, Inc. are related companies of which Charles Hardy is majority shareholder. Forklift Leasing Corporation, Inc. holds title to equipment used and/or leased by Forklift Systems, Inc.

(j) Income and expenses attributable to the leasing and rental business of Forklift Systems, Inc. were included in the financial statements of both Forklift Systems, Inc. and Forklift Leasing Corporation, Inc.

(k) The rental/leasing managers of Defendant and their respective periods of employment are:

May 2, 1984- June 1, 1984	Jay Jackson
Sometime between/ June, 1984 and April, 1985	Tom Means
April, 1985- September, 1987	Teresa Harris
October, 1987- December, 1987	Gary Watson
December, 1987- March, 1988	Roseanne Salisbury

March, 1988-Present Mike Moseley

(l) Other managerial level staff of Defendant, their positions and the terms of their respective positions are:

Service Manager:

Mike Moseley December 1, 1981-March, 1988

Office Manager:

Kathy Kernell March, 1985-January, 1988

Parts Manager:

John Garrett July 11, 1984-September 12, 1986

David Matthews August 15, 1986-November, 1989

Joe Sullivan November, 1989-Present

Sales Manager:

Dick Read December 15, 1986-April 15, 1988

Comptroller:

Bennie Lawson December 1, 1982-April, 1989

Jeff Mayfield April 1, 1989-November 1, 1989

Kathy Kernell November 1, 1989-

(m) Teresa Harris' initial compensation arrangements was salary of \$1,000, auto reimbursement of 18 cents per mile and commission on sales and leasing as follows:

\$0 - \$20,000 2%

\$20,000 - \$35,000 3%

\$35,000 + 4%

(n) In June, 1986, Teresa Harris' salary was increased to \$1,200 per month.

(o) Jay Jackson's compensation arrangement as of January 1, 1988 provided for a commission of 4% on rentals he was responsible for.

(p) John Garrett's salary as Parts Manager effective January 1, 1985, was \$1,800 per month plus 10% of gross profit from the Oscar Mayer account. His salary was increased to \$2,000 per month plus commission as of June 1, 1985.

(q) Effective November 1, 1984, Kathy Kernell as Officer Manager and Bennie Lawson as Comptroller received monthly car allowances of \$50 and \$100 respectively.

(r) Mike Moseley was provided a vehicle by Defendant from April, 1981 through May, 1988 while he was Service Manager.

(s) As of June 1, 1985, Mike Moseley's salary as Service Manager was \$2,400 per month.

(t) As of June 1, 1985, Bennie Lawson's salary as Comptroller was \$2,470 per month.

(u) As of June 1, 1985, Kathy Kernell's salary as Office Manager was \$1,300 per month.

(v) David Matthew's salary as Parts Manager was \$2,000 per month as of August 18, 1986 and was increased to \$2,100 per month as of June 1, 1987.

(w) As of September 1, 1988, David Matthews' salary as Parts Manager was increased

\$200 per month if Parts Department sales increased 10% over the sales for the same month in the previous year.

(x) The parties will stipulate to a chart describing the salaries, bonuses, commission arrangements, and car allowances for all managers.

6. *Issues to be Determined by the Court:*

(a) Did the acts of Charles Hardy engender a sexually hostile work environment with respect to female managerial employees between April 22, 1985 and October 1, 1987?

(b) Did the Defendant constructively discharge the Plaintiff by condoning sexually hostile behavior by Charles Hardy?

(c) Did the Defendant discriminate against Plaintiff because of her sex by not treating her as other male managerial employees with regard to the terms and conditions of her employment?

7. all exhibits will be shown to opposing counsel five (5) days before trial.

8. Names of all witnesses will be exchanged in writing ten (10) days before trial.

/s/ Kent Sandidge, III
KENT SANDIDGE,
U.S. Magistrate

APPROVED FOR ENTRY:

WOODS & WOODS
A professional Law Association

By: /s/ Irwin Venick
Irwin Venick

Counsel for Plaintiff
121 Seventeenth Avenue South
Nashville, Tennessee 37203
(615) 259-4366

/s/ Lawrence Wilson
LAWRENCE D. WILSON

Counsel for Plaintiff
One Burton Hills Boulevard
Suite 220
Nashville, Tennessee 37215
(615) 665-9075

DENNEY, LACKEY & CHERNAU

By: /s/ Stanley M. Chernau
Stanley M. Chernau

Counsel for Defendant
424 Church Street, 13th Floor
Nashville, Tennessee 37219
(615) 244-5480

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

TERESA HARRIS,)	
Plaintiff,)	
vs.)	No. 3:89-0557
FORKLIFT SYSTEMS, INC.,)	
Defendant.)	

TRANSCRIPT
OF
PROCEEDINGS
July 23, 1990
Volume 1 of 2

APPEARANCES:

For the Plaintiff:	Mr. Irwin Venick Attorney at Law 121 17th Avenue S. Nashville, TN 37203
	Mr. Lawrence D. Wilson Attorney at Law Suite 220 One Burton Hills Blvd. Nashville, TN 37215
For the Defendant:	Mr. Stanley Chernau Attorney at Law 13th Floor Third Natl. Financial Ctr. Nashville, TN 37219

PREPARED BY:

BOONE COURT REPORTING
Cathy Boone Leigh
P. O. Box 571
Joelton, TN 37080
(615) 876-9334

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[p. 4] The above-styled cause came on to be heard on July 23, 1990, before the Honorable Kent Sandidge, Magistrate of the United States District Court for the Middle District of Tennessee, Nashville Division, when the following proceedings were had, to-wit:

THE COURT: Teresa Harris versus Forklift Systems, Inc., docket number 3-89-557.

Are the parties ready to proceed?

MR. VENICK: Ready for the Plaintiff, Your Honor.

THE COURT: Defendant ready?

MR. CHERNAU: Defendant is ready.

THE COURT: All right. First matter is the pre-trial order. Let's see where it was. Has there been a pre-trial order entered?

MR. VENICK: Yes, Your Honor. Filed last week.

THE COURT: Okay. Well, it was filed. It hasn't been signed by me, has it?

MR. VENICK: I haven't received a copy as of yesterday.

THE COURT: I have the order received July 19; right?

MR. VENICK: Correct, Your Honor.

THE COURT: Okay. Without objection that pre-trial order is now signed and is part of the record. [p. 5] We will try the case with respect to that pre-trial order. Any other pre-trial matters before we start taking the proof?

MR. VENICK: Yes, Your Honor. In that pretrial order we provided that there would be an additional stipulation as to the terms and conditions of employment of - most of the terms and conditions of the employment of the manager of the Forklift Systems. I have that stipulation here. I can submit that to the Court.

THE COURT: All right. Any objection?

MR. CHERNAU: No objection.

THE COURT: All right. Part of the record. Okay.

MR. VENICK: Does the Court desire proposed Findings of Fact and Conclusions of Law at this time?

THE COURT: Yes. Do the parties have theirs?

MR. CHERNAU: Mine has been filed with the Clerk's Office this morning and said they will be delivered up to you. I have a copy.

THE COURT: Let me have a copy.

MR. CHERNAU: It is marked "received" so it is the same.

THE COURT: Okay. All right. Now then, does either party want the rule?

MR. CHERNAU: Yes, I'd like the rule.

[p. 6] MR. VENICK: Yes, Your Honor.

THE COURT: Each party shall get themselves in compliance with the rule. I do not know who the witnesses are.

Mr. Venick, are your witnesses out of the courtroom?

MR. VENICK: Yes, Your Honor.

THE COURT: Okay. Mr. Chernau, are your witnesses out of the courtroom?

MR. CHERNAU: Yes, sir.

THE COURT: All right. You may proceed.

PLAINTIFF'S PROOF

MR. VENICK: Your Honor, I'd like to call Teresa Harris.

TERESA GAIL HARRIS was called, and being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. VENICK:

THE COURT: Have a seat and then state your full name.

THE WITNESS: My name is Teresa Gail Harris

THE COURT: All right, Mr. Venick.

Q. Mrs. Harris, you reside here in Nashville Tennessee; is that right?

A. Yes, sir, I do.

[p. 7] Q. And you are a high school graduate?

A. Yes, sir, I am.

Q. And currently employed by your husband's company; is that correct?

A. Yes, sir. I am.

Q. And that company is in the business of providing industrial batteries to heavy equipment operators; is that correct?

A. That's part of it, yes, sir. In addition to that we sell overhead cranes.

Q. You are not in the forklift business, are you?

A. No, sir, we are not.

Q. You were employed by Forklift Systems from April 22, 1985, to October first, '87, as rental manager; is that correct?

A. That's correct.

Q. With respect to your duties as rental manager, you had a written position description, did you not?

A. Yes, sir, I did.

THE COURT: You have already exchanged exhibits, haven't you?

MR. VENICK: Yes, sir.

THE COURT: Don't need to hand him another one. Let's get on with it. That adds another day to the trial if you start handing those things. Use them and let me [p. 8] know you have given them to him previously.

MR. VENICK: Yes, Your Honor.

Q. Mrs. Harris, I provided you a copy of your written position description taken from your personnel file. Is that in fact a position description you had while you were at Forklift Systems?

A. Yes.

Q. Did you perform all those duties?

A. Yes.

Q. Did you perform any other duties other than those written on that document?

A. I did whatever I was asked to do.

Q. Now, with respect to leases that you were responsible for, can you describe what kind of leases you negotiated on behalf of your employer?

A. Well, we - I get in short-term as well as long-term leases.

Q. What was a short-term lease?

A. A short-term lease could be anything from a daily rental to a monthly rental. We had rentals that went three to six months, a year or so. It varied.

Q. What would a long-term lease be?

A. Anything over six months.

Q. Now, your job required that you travel outside the office?

[p. 9] A. Yes, it did.

Q. For what purposes?

A. To call on rental customers or leasing customers as well as new equipment sale customers. I had specific accounts that I was responsible for.

[Q. sic] Now, the other managers, did you travel out of the office more than Mr. Lawson who is the controller?

A. Definitely.

Q. How about as Mr. Moseley who was the service manager?

A. Yes, sir.

Q. How about for the parts managers?

A. Yes, sir.

Q. You travelled out of the office more than all those individuals?

A. Yes, sir, I did.

MR. VENICK: I'd like to enter the job description as Exhibit Number 1, Your Honor.

THE COURT: All right. Any objection?

MR. CHERNAU: No objection.

THE COURT: They have not been pre-marked?

MR. VENICK: I'm sorry, it was pre-marked the lower left-hand corner.

THE COURT: Doesn't have a number on it.

MR. VENICK: I did not know what number it [p. 10] would be.

THE COURT: Let me take a recess. How many exhibits -

MR. VENICK: I will mark them as I hand them in, Your Honor.

THE COURT: How many exhibits you got?

MR. VENICK: Approximately ten.

THE COURT: Number them 1 through 10. If one doesn't come in, just skip a number. Doesn't have to be consecutive. Have them numbered so that they are different numbers from the other exhibits. Saves time that way. I will put 1 on it here.

(Rental Manager job description was marked Exhibit 1.)

BY MR. VENICK:

Q. Mrs. Harris, we have stipulated to your compensation arrangement as rental manager. Can you describe that arrangement?

A. I was paid a base salary, commissions onto rental trucks. There were two or three specific accounts that I handled that I was paid sales commissions on, and I was paid 18 cents a mile.

Q. Now, was that commission basis part of your compensation arrangement when you began employment?

A. Yes.

[p. 11] Q. And the commissions that you got, they were based on rentals that were owned by both Forklift Systems and Forklift Leasing Corporation; is that correct?

A. That's correct, yes, sir.

Q. Let me hand you a document and ask you if you can identify this, please.

A. This is a list of the rental units for Leasing and Systems.

Q. Is that taken out of your personnel file?

A. I don't really know.

Q. Have you seen it before?

A. Oh, yes, sir. I would do update this on a regular basis so this would be something that I gave to the receptionist to type.

Q. Handwriting that's on there is your handwriting; is that right?

A. Doesn't - no, sir, this looks like Charles Hardy's handwriting to me.

Q. This does include all the rental units you are responsible for?

A. As far as I know, yes, sir.

MR. VENICK: Like to move that into evidence as Exhibit 2.

THE COURT: Any objection?

MR. CHERNAU: No, sir.

[p. 12] THE COURT: Part of the record.

(List of rental units was marked Exhibit 2.)

Q. Now, with respect to the salary and compensation arrangement you had previously described, were there any changes in that arrangement while you were employed at Forklift Systems?

A. Yes, sir. Originally I was paid commission on any sales that I assisted in. In February of '86 Charles called me into his office.

Q. That's Mr. Hardy?

A. Yes. Mr. Hardy called me into his office and told me that I would be receiving a 200 dollars a month base salary increase because I was doing a good job and he was happy with my work.

When it came time for commissions on new trucks or new sales in March and I had figured the commission statements, Mr. Hardy told me that I wasn't going to be getting commission on all the sales that I had, just certain accounts and he couldn't afford to pay me on every lift truck that I sold, just certain accounts. So in essence, it really wasn't an increase but rather a decrease.

Q. Was there any other change in your commission basis or employment compensation while you were employed at Forklift Systems?

[p. 13] A. Not that I am aware of, no, sir.

Q. Let me hand you this document, Mrs. Harris, which are your W-2 forms for the years 1985, 1986 and '87.

A. Uh-huh.

Q. Will you please state to the court your total salary or income was in 1985. It is listed number 10.

A. \$13,796.74.

Q. And for 1986?

A. \$30,024.41.

Q. And for 1987?

A. \$26,050.93.

Q. 1987 figure was the salary commission bonuses you received from January 1, '87, through September 30, '87; is that correct?

A. Well, it would cover that period of time. I did receive a check on October 15, but that was for my commissions for the month of September.

MR. VENICK: Like to move that into evidence as Exhibit Number 3.

THE COURT: Any objection?

MR. CHERNAU: None.

THE COURT: All right, then.

(W-2's were marked Exhibit 3.)

Q. When was your salary or job performance subject to review?

[p. 14] A. In May or June.

Q. Was that during an annual review of some sort?

A. Yes, sir.

Q. Did you have such a review in 1986?

A. Yes, sir, I did.

Q. Who did you have that review with?

A. Mr. Hardy.

Q. What did you discuss at that time?

A. He told me that I was doing a good job. He was happy with my work.

THE COURT: When was this?

THE WITNESS: In 1986.

THE COURT: Can you be more specific?

THE WITNESS: May or June. I don't know exactly what day, no, sir.

THE COURT: Okay, go ahead. He told you what?

THE WITNESS: He told me that he was really happy with my work. He told me what my bonus was going to be. He told me that my bonus was going to be less than the tenured managers because I had only been there for a year but when I would get my bonus in 1987 that would be the same as everybody else's, and that made sense to me.

Q. Now, what did he tell you at that time that consideration of salary increase would be on? What basis would that be?

[p. 15] A. My salary increase was based on when I would get a salary increase would be based on how my department did, how well my department did.

Bonuses were based on how the overall company did as well as our profit sharing. That was overall companies, Leasing and Systems.

Q. At any time prior to and including the date you had your review with Mr. Hardy in May or June of '86, had he expressed to you any complaints about your job performance?

A. Oh, no, sir. As a matter of fact, he told me one day that I was his hero. That I was doing a really good job

in that department and he was real excited about me being in employ for Forklift Systems.

Q. Now, did you have a review, similar review with Mr. Hardy in 1987?

A. I didn't receive a review in 1987.

Q. Did you have a meeting with Mr. Hardy in 1987?

A. The only meeting that I had with Mr. Hardy in 1987 as far as the money was concerned was in May or June, and again I don't remember which month. He called me in and said that my bonus was 3,000 dollars and my bonus was going to be less than the other tenured managers because I was on commissions and it was going to be less.

Q. Did you discuss a raise with him?

[p. 16] A. No, we did not discuss a raise. We did not discuss my job performance. We didn't discuss my job, period. He just told me that, and that was it.

Q. So what did Mr. Hardy tell you, if anything, about your job performance at that time?

A. He didn't it wasn't mentioned.

Q. What complaints, if any, did Mr. Hardy bring to your attention at that time and since your last meeting in May or June of '86?

A. I don't recall any. He never complained to me about my job performance. There was one incident I remember about a pair of forks that we needed to put a pair of polished and tapered forks on a new lift truck for it to be delivered, and I had sent them out to a fabricator

to polish and taper them and Mr. Hardy had sent me a memo in reference to that. I don't remember exactly when it was.

He said I should have waited and ordered them from the factory, and I in my opinion the best thing to do would be to go ahead and get that truck delivered because that truck was on our floor plan. It might have cost us a little bit more money, but the return on our money would be better if I got them quicker.

Q. When did that occur?

A. I don't remember exactly. Some time in '86 I think or '85. I am not sure. But that was the only [p. 17] complaint.

Q. At the time you and Mr. Hardy had this meeting sometime in May or June of '86, had you started having any concerns about the way Mr. Hardy was treating you as a rental manager?

A. In '86?

Q. Sorry, in '87. When you had your meeting with Mr. Hardy in May or June of '87 where he mentioned a bonus to you.

A. Oh, yeah. I was not very happy, no, sir.

Q. Why weren't you happy? How had he been treating you with respect to being a rental manager?

A. As far as a rental manager, he had made the statement several times, "We need a man as a rental manager." He said it in the middle of the lobby.

One day he punched Dick Reed on the arm and said, "Hey, Dick, don't you think we need a man as a rental

manager?" And Dick just stood is there. Didn't say anything. He got red in the face.

I said, "Hey, Dick, I really appreciate you taking up for me on that one."

He had said that more than one occasion. He would tell me he called me a dumbass woman. Told me that I was a woman; said, "You are a woman. What do you know?"

[p. 18] One day in the lobby there was the guy I don't know the man's name, but he was the man that did our specialty things. He had made our Forklift Systems caps. And he had come in with the cap, and Charles - I was at the receptionist area and Charles said, "Hey! Teresa, don't you like these caps? Don't they look fantastic?", blah, blah, blah.

And I said, "No, Charles, actually I think the beige on them is a little too pink, and I don't think it looks too good." He said, "What in the hell do you know? I am going to talk to somebody that knows what they are talking about", and he walked back to the back to the service department.

In managers meetings if I voiced my opinion, I was told, "What do you know? You are a woman."

THE COURT: By whom?

THE WITNESS: By Mr. Hardy. But it became a joke. Other managers would say the same thing to me. Mike Moseley said it to me several times.

Q. Became a joke to whom?

A. To everybody at Forklift Systems.

Q. Was it a joke to you?

A. It wasn't funny to me. It embarrassed me.

Q. Please tell Your Honor the other things Mr. Hardy would do.

[p. 19] A. He called me - I was called into his office in reference to a salesman's commission.

THE COURT: When?

THE WITNESS [sic]: In the summer of 1987.

THE COURT: Is this the May-June affair that you have already talked about, May-June meeting?

THE WITNESS: Oh, no, sir. This was in reference to a salesman's commission. Not when he called me in about my bonus.

THE COURT: All right.

A. And I had been doing sales commissions from the day I walked in the door since 1985. And I had done them the same way. They went to Charles Hardy every month for approval, and I went over them with Bennie Lawson, the comptroller, and he wanted to know why I had changed it. I said, "I haven't changed it. You know, this is the way they have been all the time. You get them every month."

And he said, "Ah, you are a dumbass woman. You have cost me all this money."

Q. What else did Mr. Hardy do? What did he have you do as far as bringing coffee to him?

A. He would buzz me in my office and ask me to come over and get coffee for himself and other guests that he had. One day - my office was all the way across from his the far corner, the far wall, and the lobby was in [p. 20] between. One day he had Keith Welham in his office.

Q. Who is Mr. Welham?

A. Charles Hardy was involved in a limited partnership of some sort, and I don't really know all the details, but he worked with Keith Welham on it. Called me and told me to come in, and I went over and he told me he wanted to get some - he wanted coffee and he said, "Oh, by the way, Teresa, don't you think it is about time we started screwing around? You and Larry have been married over a year now." And I just looked at him.

Q. How often did Mr. Hardy make a comment "how about screwing around?"

A. Said that to me on more than one occasion. He also told me one time that we were going to go to the Holiday Inn and negotiate my raise.

Q. When he made the comment about screwing around a number of occasions, was that between you two or in front of somebody else?

A. He wouldn't say these things just when it was the two of us. He always said it when there were other people around.

Q. The other comments that you testified about Mr. Hardy making: "What do you know? You are a dumbass woman", "we need a man as a rental manager", you ever hear him make any similar comments about that to men?

[p. 21] A. He never called any of them dumbass men or told David Matthews, "We need a female for a parts manager" or Mike Moseley, "We need a female for a service manager." He never said that.

Q. With respect to bringing coffee into Mr. Hardy's office when there were customers, did you ever see him or see male managers bring coffee into customer meetings?

A. No, sir.

Q. With respect to the comment that Mr. Hardy made about negotiating your raise at the Holiday Inn, who was present when that comment was made?

A. One that stands out in my mind the most was in front of David Thompson, who was a sales representative, and Gordon Cofflin, who was our Nissan factory rep.

Q. What was Nissan with respect to Forklift Systems?

A. It was our major supplier. We were the distributor for Nissan forklift trucks.

Q. What things did Mr. Hardy do with respect to coins directed towards female employees?

A. He would ask us to get quarters. He always used the word quarter out of his pocket. He would say, "Teresa, I have a quarter way down here. Would you get that out of my pocket?"

[p. 22] Q. Front pocket or back pocket?

A. It was in his front pocket.

Q. How often did he do that?

A. It was frequently. Once a week, once every two weeks. It was pretty frequent.

Q. Did you ever see him direct that language to any male employees?

THE COURT: During what period of time that you were there?

THE WITNESS: Oh, that was -

THE COURT: Did it start right away?

THE WITNESS: He had always made remarks like that, yes, sir.

THE COURT: No, about the quarters.

THE WITNESS: Yes, sir.

THE COURT: Started right away?

THE WITNESS: He'd always - yes, sir. Yes, sir.

THE COURT: For the two and a half or three-year period?

THE WITNESS: Yes, sir.

BY MR. VENICK:

Q. Did you ever see him make similar comments to males?

A. No, sir.

[p. 23] Q. What about anything that Mr. Hardy would do objects on the floor?

THE COURT: What did you tell him when he asked you to get the quarter out?

THE WITNESS: I just would look at him. I wouldn't say anything.

THE COURT: Would you comply?

THE WITNESS: Not hardly. No, sir.

THE COURT: Okay.

BY MR. VENICK:

Q. Did any of the females comply?

A. No, sir. Never.

Q. And was that comment directed to other females as well as yourself?

A. Yes, sir.

Q. What about Mr. Hardy throwing objects on the floor near female employees?

A. Yes, sir, he did that. One day in his office Stephanie Vanns and myself were in his office, and his desk is like this and he is this way and I am here and Stephanie is here. And his trash can is like to the left, and he threw something. Stephanie was standing there. Threw it over. Stephanie had on this sleeveless top, and he threw it down and said, "Stephanie, pick that up for me." And she picked it up, and when she did you could see down her [p. 24] top. And he told her he wanted her to wear that kind of top more often.

Q. Was that the only occasion where that happened?

A. I had seen him do that before.

Q. With Ms. Vanns?

A. With Ms. Vanns, yes. He would tell the girls that he had heard that eating corn would make your breasts grow, and the girls who had the large breasts that worked in our office, he would ask them if they ate a lot of corn. Dixie Shadrake, he would say - he would change it around a little bit for her benefit. Dixie is an American Indian so when he would ask Dixie he would say, "I bet you are eating a lot of maize."

Q. Did he ever do that to you?

A. No, he never said anything about my breasts, no, sir.

Q. Did Mr. Hardy ever make any comments to you about any other of your body parts?

A. His big thing with me was my bottom. He would refer to it as a racehorse ass. And one -

THE COURT: When did that happen? On more than one occasion?

THE WITNESS: A number of times, yes, sir, in 1987. In June I remember specific June or July -

THE COURT: Eighty-seven?

[p. 25] THE WITNESS: Yes, sir. He had been to Florida. He and Sandra had been to Florida

THE COURT: Sandra is his wife?

THE WITNESS: Yes, sir.

A. And he said, "Hey, Teresa, you wouldn't believe these bikinis these girls are wearing now." He said, "They wear there is nothing but strings on the bottom." He said, "Of course you couldn't wear one like that because your ass is so big, if you did there would be an eclipse and nobody could get any sun."

Q. Did he make other comments to you about your body parts besides that one? Any comments about your jeans?

A. He told - well, if I wore tight jeans he would make a comment about my butt or if I, you know, yeah. He - yeah, he did. But that was primarily the part of my body that he talked about.

Q. Now, how did all these comments and behaviors of Mr. Hardy affect you?

A. It embarrassed me. It embarrassed me. The comments about my how I looked embarrassed me, but the comments about my ability to do my job and that I was stupid and I was dumb devastated me. I hated walking in there. He embarrassed me. Everybody made fun of me because Charles Hardy did that. And I was supposed to [p. 26] laugh about it, and it wasn't funny.

Q. He was leading the pack, huh?

A. He was leading the pack.

Q. How were you feeling? What kind of symptoms were you having by July or August of 1987?

A. I cried all the time. I was having shortness of breath. I wasn't sleeping at all. I was drinking heavily. I drank a lot. I would get drunk every night so I would go

to sleep so I could get up and go to work the next day, and I hated it. I shook. I would sit in my office and I would shake. I hated it. I just hated it.

Q. Did you have occasion to see a physician?

A. I went to see my doctor. He ran tests on me. He did an EKG and he did chest x-rays because of the breathing problem, and there was nothing physically wrong with me. He attributed it all to anxiety and gave me tranquilizers and sleeping pills.

Q. Outside of your job, was there anything else happening in your life that would cause any kind of anxiety on your part?

A. No.

Q. We were talking August of 19--

- A. 1987, yes, sir.

Q. When did you see your doctor? Do you recall?

A. On August 17, 1987, on a Monday.

[p. 27] Q. Now, prior to August 17, 1987, had you tried to speak to Mr. Hardy about how he was treating you?

A. Oh, def - yes, sir. I went to talk to Charles. We were - my grandmother - I went in to see Mr. Hardy in I talked to him in 1986. My grandmother had passed away in August of 1986, and Mr. Hardy came to the funeral home and extended his condolences and told me to take as much time as I needed, and the company sent flowers.

And I went back to work on Friday, and that was our pay day on Friday. And when I got my check, it wasn't

correct. And Mr. Hardy had deducted two days' pay from my check for being off when my grandmother died. And I talked to Mr. Hardy about that, and he told me that he didn't know anything about it. That he didn't do it. That Bennie Lawson had done it.

And I said, "How could Bennie Lawson have the authority to dock my check?" And he said, "Well, I just don't know."

And I said, "Well, that don't make sense to me that Bennie Lawson could do that. You are my immediate supervisor. You sign my check, and you should know how much money I make. I mean, there could be a computer error and I might be being paid too much, you know. It is your job to know how much I make and to watch that."

Well, after I had said - he told me that he [p. 28] would make it up to me. He said, "I am real sorry; I will make it up to you at bonus time."

When bonus time came around, I got less. But after that because I had said, you know, "It is your job to know", he would say, "Ah, hell, Teresa, you don't think I am a very good manager anyway. You have told me I am a piss poor manager" so he would rub it in to me.

When we were moving into the new building - we were on Fader Court when I first went to work there, and I had an office originally my office was next to Charles' and then we converted that to a conference room and my office was - I was put in another office.

But when we were moving over to Elm Hill Pike, I wasn't getting an office. I was going to be put in a cubicle out in the middle of the lobby.

And I asked Charles why, and he didn't really give me an answer why. But at any rate, I ended up with an office, but my office was the same size as David Matthews, and they were smaller. But because I had brought to his attention that I wasn't getting an office and because my office was small then that became another big joke with the company, the other big employees there. "Oh, yeah, Teresa, where are we going to put your couch and your table?" And it was supposed to be real funny. That wasn't funny either.

[p. 29] Q. All the other managers got offices?

A. Yes, sir.

Q. Without -

A. Without - well, I don't know if they had to ask him, but the plans were that everybody was getting offices except for me.

Q. So what had you learned during this period of time as far as going to Mr. Hardy with complaints?

A. Any time I ever complained to Charles, I lived to regret it because it was thrown up to me. I was embarrassed or ridiculed about it. It was never any - if you said anything to him in confidence like those things then, hey, you heard about it later.

Q. Now, you had previously testified that by August of 1987 you were in an extreme state of anxiety?

A. Yeah. Yes, sir.

Q. You were crying, having trouble with your family?

A. Pardon?

Q. You were having trouble getting along with your kids, I think?

A. I was ugly to my children. My children would call me and I would be really ugly to them and I would say terrible things to them and hang up on them. I always did that for Mr. Hardy's benefit because he had made remarks to [p. 30] me about that too: "Your kids call all the damn time." So when my kids would call, I would nearly have a heart attack if Charles Hardy was anywhere within ear shot.

Q. With respect to how you were feeling by August of '87, what did you finally decide you had to do?

A. I went in and talked to Mr. Hardy. I decided that I couldn't work there any more. I was - I couldn't work for him. I went in and talked to him about it and turned in my resignation on August 18, 1987.

Q. Who else had you spoken to about doing that before you spoke to Mr. Hardy?

A. Spoke with Dick Reed and David Matthews.

Q. Mr. Reed had what position at that time?

A. He was the sales manager. And David Matthews was the parts manager.

I went so far because my intention was to never darken that door again as to get out rental agreements

and give Mr. Reed a list of all the commitments I had made as far as rental units were, and he was well aware of my intention not to come back there ever again.

Q. Why were you going to see Mr. Hardy at this time in August of '87?

A. To tell him I had had it. I wasn't going to work there any more. I couldn't work there any more.

Q. And when did you meet with Mr. Hardy?

[p. 31] A. It was late in the afternoon. It was after 5:00 o'clock.

Q. Who was present?

A. Mr. Hardy and myself.

Q. And what happened during that discussion?

A. I told him how I felt. That he embarrassed me. I told him that it had hurt my feelings. He had insulted me. That I didn't get a review. That he had called me a dumbass woman. That he made me feel stupid and useless and that I couldn't work there any more. That I had had it. That it was demeaning to me personally. It was demeaning to me as a female and it made me - it embarrassed me to me. It made me feel spineless that I let this man talk to me that way.

Q. What did Mr. Hardy tell you during that meeting?

A. He told me he was sorry. He asked me to reconsider and that he was sorry. And I told him at first I told him that I kind of had a problem with reconsidering, but then I told him - he said, "Will you sleep on it and you

come back in the morning and give me your decision?", and I told him that I would.

Q. What did he promise to do?

A. He told me that he would stop. That he would work - that he would stop.

[p. 32] Q. And what did you decide to do?

A. I decided that I would come back. And the next morning I got to work before Charles Hardy did, and when Mr. Hardy came in I immediately went to his office and I closed the door and I told him that I had reconsidered and that I was going to stay. And he patted me on the back and he hugged me and he said, "Hey, let's get to work and forget all of this", and I said, "That's fine."

Q. And how would you describe Mr. Hardy's behavior for the few weeks after your meeting with him on August 18?

A. Oh, at first he really tried. He really did. He would catch himself. I don't know exactly what he was going to say because he would stop before he said it. He would say, "Oh, I forgot, Teresa, I am not supposed to talk to you like that any more." I don't know what, you know. He would stop.

But then in September of 1987 I told him that I was working on a multiple lease deal at ASI, which is Aladdin Synergetics, and that I really felt like we were going to get that order. He said, "What did you do, Teresa, promise the guy at ASI bugger Saturday night?"

Q. What was the implication of that statement? What does that mean?

A. That I had sex with customers.

Q. What did you decide after Mr. Hardy made that [p. 33] statement?

A. I wasn't going to work there any more.

Q. So what did you do to effect that decision? What did you do to follow through with that?

A. I talked to Dick about it. And I wrote Charles Hardy a letter. And I - to tell him that I wasn't coming back and why.

I gave it to Dick and I left that day, and that night I decided that that wasn't a real smart move on my part. If I walked out that day, I had worked half the month of September and I had a lot of long - I had rentals that were going to, you know, be there for the month and that if I didn't stay then I wouldn't receive my commission check for September. And that was over a thousand dollars, and I needed the money so I decided to stay until October first.

Q. Let me hand you this document, Mrs. Harris. Can you identify that?

A. This is the letter that I wrote to Mr. Hardy.

Q. And what's the date on the letter?

A. September 16, 1987.

Q. There is an envelope attached to that letter; is that right?

A. Yes, sir.

Q. And did you write something on the envelope?

[p. 34] A. I wrote "to Charles Hardy".

Q. And that's what you gave to Mr. Reed?

A. Yes, sir.

Q. It was unopened at that time; is that right?

A. It was unopened.

Q. And when he gave it back to you, was it opened?

A. No, sir, it wasn't opened. I made a notation on the back of it the day that I opened it.

Q. And when was that?

A. I opened it on April 3, 1988, to send to Mr. Lorenzo Benson who was the investigator for my complaint with the EEOC.

MR. VENICK: I'd like to move that into evidence as Exhibit Number 4, Your Honor.

MR. CHERNAU: No objection.

THE COURT: Part of the record.

(9/16/87 letter was marked Exhibit 4.)

Q. So your last day at Forklift Systems was October first, 1987?

A. Yes, sir.

Q. Now, between the time that you decided in September '87 to leave Forklift in October first of 1987, did anything else happen to affect your decision in any way?

A. No, sir.

[p. 35] Q. Nothing happened that would make it more likely for you to leave or less likely for you to leave?

A. No, sir, I loved my job. I made good money. I liked what I was doing. I liked my customers. I loved my job. I wanted to work there. I didn't want to leave. I wanted to stay. We had good - we had a retirement plan, we had disability, and I loved it. So . . .

Q. So what happened on October first?

A. I left. I waited until we received our checks and I left.

Q. What time did you get your check?

A. It was late in the afternoon after 4:00 o'clock.

Q. Was that unusual?

A. That was very unusual. We usually received our checks before noon.

Q. But for some reason that day it was late?

A. For some reason, yes, sir. I don't know why.

Q. Did you tell anyone else you were leaving that day?

A. I had spoken with Dick Reed earlier. I didn't talk to Dick that day, but I had spoken with Dick Reed earlier and told him that after the September incident that I was going to leave on October first and why I was leaving. I had told David Matthews that I was leaving that [p. 36] day, yes, before I got ready to leave. I had already put my things in my briefcase, and I walked to the back to find

David and I told David that I was leaving. That this was it, you know; "I am out of here." That I didn't have to take this any more and that I had in fact talked with the TCM factory rep.

TCM is a competitor of Nissan's. They also handle lift trucks. And that I would like to go into the lift truck business because I did like that business and that I had talked to them.

Q. Had it not been for the behavior of Charles Hardy, what action would you have taken with regard to your continued employment with Forklift Systems on October first, 1987?

A. I'm sorry?

Q. Had it not been for the behavior and actions with Charles Hardy, what actions would you have taken with your continued employment with Forklift Systems on October first, 1987?

A. I would have retired there. I loved it.

MR. VENICK: No further questions, Your Honor.

THE COURT: All right. You may cross examine.

I tell you what, let's take about a ten-minute recess.

(A short recess was taken.)

[p. 37] THE COURT: Cross examine.

CROSS EXAMINATION

BY MR. CHERNAU:

Q. On October first, 1987, you collected your paycheck and left your place of employment; is that correct?

A. Yes, sir, it is.

Q. Without notice to anyone?

A. Pardon?

Q. Without notice to anyone?

A. I spoke with David Matthews.

Q. At the time that you spoke with David Matthews, I believe you told him you could not take it any more?

A. Yes, sir, that's correct.

Q. Do you know who was in Mr. Hardy's office at the time you said you couldn't take it any more?

A. No, sir, I don't.

Q. Do you know whether or not it was a man who was going to do business with Forklift Systems that your husband had previously been doing business with, taking the place of your husband's business with Forklift Systems? You know what I am talking about, don't you?

A. No, sir, I - would you ask the question, please.

Q. Wasn't there a man in Mr. Hardy's office at the [p. 38] time you said to David Matthews "I can't take this any more", wasn't there a man sitting in Mr. Hardy's office with his truck parked right in the front of the

building that was going to do business with Forklift Systems taking the place of the business that your husband's company had been doing with Forklift Systems?

A. I don't remember seeing anyone there that day, but it was not unusual for my husband's competitors to be at Forklift Systems. I had in fact written purchase orders to my husband's competitors. I had been to lunch with my husband's competitors.

MR. CHERNAU: How am I go to control this, Your Honor? I need her to be responsive to the questions.

MR. VENICK: Your Honor, she is answering.

MR. CHERNAU: If her answer is nobody was in there, I accept it.

THE COURT: Your testimony is there was nobody in the office at the time he is referring to with Mr. Hardy?

THE WITNESS: I don't know. But it was not unusual for my husband's competitors to be at Forklift Systems. They had been in the past. And that made no difference to me if they were.

Q. Is it a fact then on Friday, October 2, 1987, you met with your attorney, Larry Wilson?

[p. 39] A. Yes, sir, that is correct.

Q. Is it a fact that on Monday, October 5, 1987, you filed your EEOC complaint?

A. Yes, sir, that's correct also.

Q. Is it also a fact and correct that not until August of 1987 did you ever complain to Mr. Hardy about the things you now complain of?

A. No, sir, that's not correct. I testified that I had spoken with Mr. Hardy about my office and I had spoken with Mr. Hardy about the docking my pay with my grandmother, and there was no reason for me to talk to Mr. Hardy about not getting a review because I had received one the previous year.

Q. On December 7, 1989, I took your deposition at Mr. Venick's office. Do you recall that?

A. Yes, sir, I do.

Q. Do you recall me saying to you I am now at line 14, page 12:

"Q. Okay, up until August of '87 you had not complained?

"A. The things that Charles said became more personal in '87.

"Q. But my question is did you prior to August of '87 - I am going to let you explain anything you want. I am not trying to cut you off, but I need to get my answers. Prior to August of '87 you had not complained; is that correct?

"A. I went into his office to complain before then."

"Q. When was that?"

[p. 40] "A. Probably June or July. I don't recall exactly.

"Q. Of what year?

"A. Of that same year, 1987."

So if we take your testimony here -

A. Uh-huh.

Q. - does that mean that during the time of your employment from April '85 until the late summer of '87, probably June or July when you tried to go in you say, you did not complain until those months of 1987. Isn't that an accurate statement?

A. No, sir.

Q. Well, that's what you said in your deposition, and I just asked you the question; you gave a different answer. What's your answer to the question?

A. Also in my deposition, Mr. Chernau, I talk about the office and I talk about my grandmother. I also -

Q. Okay, other than the office that you mentioned to him and that you got and other than your grandmother that died, were there any other things that are really the base of this lawsuit: the sexual harassment, the hostile environment, anything else you ever complained about to him?

A. I did not complain to Mr. Hardy about the quarter in the pocket or any of those type things.

[p. 41] Q. All right.

A. But I did complain to Mr. Hardy in August because I did not receive a raise. I was not called the dumbass woman until 1987. I was not denied reviews

until 1987, and there was no reason for me to complain to Mr. Hardy up until that time.

Q. So up until that time, all of these things that you said were continuing were all right up until then?

A. No, sir.

Q. Well, I thought that's what you just said?

A. I said I complained about my review in 1987.

Q. Well, we are going to get to that. That's when you taped that conversation, wasn't it?

A. Yes, sir, it mosy [sic] certainly is.

Q. Okay, we're going to talk about that in a moment.

A. Okay.

Q. Let me ask you this. Is it a fact and is it correct that in August of '87, if that's the month you say that you complained, that a business relationship between your husband and Mr. Hardy began to deteriorate?

A. No, sir.

Q. That's not accurate either. Okay.

A. No, sir, it is not.

Q. Tell me what's accurate. When did it start to [p. 42] deteriorate?

A. Mr. Hardy had Stephanie Vanns cancel all orders with my husband on October 7, 1987. Up until that point, he received the bulk of the business.

Q. During that period of time – we have already gone over this now. You remember the trial in Chancery Court. Remember the trial in Chancery Court?

A. Yes, sir, I do.

Q. Remember the trial in Circuit Court?

MR. VENICK: Your Honor, object to this as irrelevant.

MR. CHERNAU: Certainly not irrelevant. I am cross examining.

THE COURT: I don't know whether it is relevant or not. Go ahead.

A. Yes, sir. There have been several courts, yes, sir. I remember them.

Q. And do you remember the testimony that for a period of time Mr. Hardy had voiced a lot of complaints about the way your husband was running the business that he had invested in. Isn't that correct?

A. He [sic] that happened in 1986, yes, sir.

Q. And didn't you and didn't it heat up where Mr. Hardy finally said around this time, "Look, either we've got to replace you or you buy it, whatever you want to do, [p. 43] but I don't want you running it any more." Isn't that accurate?

A. I don't understand what you are asking me didn't it heat up. You are going from '86 to '87. My husband was forced to buy the business in 1986, yes, sir. I was employed there until October of 1987. Orders were cancelled in '87. I don't –

Q. The orders being cancelled were in conjunction with terminating your husband's business with Forklift, were they not? Wasn't that the termination of the relationship of doing business?

A. They were terminated October 7 the orders were cancelled. I left on October first.

Q. And let let [sic] me ask you this. Isn't it a fact that during the time of your employment, your compensation increased during each period of your employment? Isn't that accurate?

A. I did a good job, yes, sir. I was paid on the sales of my department, and it is obvious by my tax returns that I did better every year. Yes, sir, it did increase. I worked hard.

Q. And increased dramatically, didn't it? In 1985 I think you said you made approximately \$13,000?

A. That was just from April until December. That wasn't a full year.

[p. 44] Q. Right, that's right. Because in '86 you had a full year and and [sic] you made 30,000 dollars?

A. That's correct.

Q. And in ten months, in just ten months in '87 you had made 30,000 dollars. Isn't that accurate?

A. I don't think so, Mr. Chernau. I think it said \$26,000.

Q. I will give it to you exactly. In ten months in 1987 you made 26,050 dollars and 93 cents?

A. Ten months in when, sir?

Q. 1987.

A. I made how much?

Q. \$26,050?

A. Right, that's what I said. In '87.

Q. That's for ten months?

A. Yes, sir. I thought you said I made 30,000 dollars in ten months.

Q. Prior to your departure from your employment at Forklift, -

A. Uh-huh.

Q. - you had planned to open a business in competition with Forklift. Is that an accurate statement?

A. Yes, sir, I had.

Q. Is this an accurate statement that at that meeting with Mr. Hardy you secretly taped the conversation?

[p. 45] A. Yes, sir, I did.

MR. VENICK: Objection. What relevance is whether it was taped?

MR. CHERNAU: Because I am going to ask her about that, and I am laying the basis for it.

THE COURT: Okay.

BY MR. CHERNAU:

Q. Is that an accurate statement?

A. Yes, sir, I did do that.

Q. And did you subsequently transcribe the tape yourself?

A. Yes, sir, I did.

Q. And did that tape - now, Mr. Hardy didn't know he was being taped?

A. No, sir, he did not.

Q. As a matter of fact, you stayed in there so long that the tape ran out?

A. Yes, sir, that's true.

Q. So when you transcribed the tape, a large portion that happened at the end of the meeting was not on the tape?

A. There was some. I don't know if it was a large portion, but there is some that's not, no, sir.

Q. And did Mr. Hardy on the tape say to you - now, he doesn't know he is being taped. Did he say to you [p. 46] that he did not know that you were offended by any of his conduct?

A. Yes, he did say that.

Q. He didn't know he was being taped?

A. No, sir, he didn't.

Q. And did he say to you, "You know, Teresa, I am really surprised because you have all been treated as one of the boys. We always thought of you as one of the boys." Is that an accurate statement?

A. Yes, sir, he did.

Q. Let's stop one moment. Is the reason he said you were treated as one of the boys and didn't know what he had done was offensive to you is because two or three times a week you would stay after work with the men as the only female and drink beer and talk? Is that an accurate statement?

A. I did stay two or three times a week and drink beer, yes, sir. And 95 percent of that time my husband was also there.

Q. Which husband is that? Which husband are you talking about?

A. Larry Harris.

Q. Is it accurate that Mr. Hardy during the transcription of this tape - let me ask you something before I ask you that. Your husband Larry and Charles [p. 47] Hardy and his wife Sandra were social friends, were you not?

A. We went out a couple of times together. We weren't palsy-walsies where we were out every weekend or anything like that. Probably over the course of two and a half years outside something that involved work I can only recall one time that we went out. We went to see Lewis Grizzard. The other times they were pretty much business related.

Q. Well, is it accurate or inaccurate to say that you had a social relationship with Mr. and Mrs. Hardy?

A. I would say that we did, yes, sir.

Q. Now, on the tape did Mr. Hardy say to you:

"Well, you have avoided talking to me unless you had to. I think that the mistake you made is that you should have come in here and said, 'Look, we've got to get something straight and if we can't get it straightened out, I think maybe it would be better if I went elsewhere.' You don't come in and say, 'I am turning in my resignation.' I could have said okay and then you'd be gone. First of all, if you decide in the morning, we are not going to mistreat you in any way, form or fashion."

Stopping at that point, when he said "in the morning" he was talking about thinking it over and seeing if you really wanted to resign, wasn't he?

A. Yes, sir.

Q. Then he went on:

[p. 48] "I think your loyalty as an employee and your friendship means more than we are talking greenback dollars which will be replaced. Money is not so important that I am going to" -

And this is an expletive omitted. Not going to repeat that. It's like a Nixon tape thing. Has nothing to do with the subject.

"I am not going to - somebody out of their livelihood, but I think you have erred by not coming in here and talking to me. You and I have been close enough as an employee to employer relationship and as friends that you ought to feel comfortable to come in here and talk to me about anything."

Didn't he say that to you on the tape?

MR. VENICK: At this point I am going to object because, as Mr. Chernaau pointed out, there is incomplete transcript of this document. Therefore, whether part of it is introduced or the whole thing, we can't get to any of it because it is not a complete document. All we can do is testify about her recollection of the conversation.

MR. CHERNAU: I am cross examining her about a transcript that she produced from a tape that she made without this man knowing it, and I have the right to cross examine.

THE COURT: I will overrule the objection. The only thing you left out was the expletive deleted?

MR. CHERNAU: Not expletive, expletive.

THE COURT: Well, however you want to pronounce [p. 49] it.

MR. CHERNAU: Is it expletive?

THE COURT: I don't know. Is that all you left out?

MR. CHERNAU: That's all I left out.

THE COURT: All right, she can answer the question. Mr. Venick, you can cross examine about that and bring out that it may have left out something that he didn't declare to the court.

You may answer the question.

A. Yes, sir, he did say that.

Q. Now, also in this tape, didn't he say to you that he didn't treat you differently than anybody else, he said

the same things and it was all a joke. That he never knew you took them seriously. Didn't he tell you that?

A. He joked with everybody. Yes, sir, he did. But he didn't say to the male managers to get quarters out of their pocket and didn't tell them to pick up things off the floor and he didn't call them dumbass men.

Q. We are going to talk about that in a minute if you will just let us go through this now. Didn't he say to you - and he didn't know he was being taped -

"Any time, Teresa, - you have been around me long enough to know that at any time I am serious that I will call you in here and we'll talk about it. And if I am not serious about it, it goes over about like what you were in here that day and I said I [p. 50] really didn't give a" - expletive deleted. "I mean, I didn't mean that in a demeaning way. I say the same things to Jay. He doesn't take it the way you take it, and if he does he doesn't say anything to me."

He said that, didn't he?

A. Yes, sir he did.

Q. Didn't he say to you in a question form, "I play favorites?" And wasn't your answer, "No, I didn't say that"? Isn't that in the tape?

A. Yes, sir.

Q. Now, let's see if on the tape where you talk here a little bit about your review, all right?

A. Yes, sir.

Q. And I am going to ask if he said this to you.

MR. VENICK: Your Honor.

Q. "I think you have gotten upset and let a lot of things" -

MR. VENICK: Your Honor, if Mr. Chernau is going to be reading from this document, I would appreciate it very much if he would tell me what page he is on because all the pages are numbered.

MR. CHERNAU: Well, I am at page 11 now.

Q. Okay, we're back to what he said to you.

"I think you have gotten upset and let a lot of things grow on you. First of all, you don't come in and tell somebody that you are going to quit and then try to discuss the reasons why. What you should have" [p. 51] "done is was come in and say, 'Hey, look, I have got some problems and we've either got to get them worked out or I am going to have to quit.' When I worked for somebody else, I always said, 'Hey, look.' If you have got a grief or bitch, you give the company an opportunity to straighten it out. And if they don't straighten it out, you have one or two alternatives. You either take it and go with it or you quit. You don't bitch, you don't bellyache, you don't moan, don't mope around and you don't talk to people like you have been doing."

You said, "That is not true." You denied that you have been doing those things; is that right?

A. Yes, sir.

Q. And then he said after talking to you about getting the things straightened out at the bottom of page 11, "First of all, if you decide in the morning, we are not

going to mistreat you in any way, form or fashion." And that's what I had read to you a few minutes ago; correct?

A. Yes, sir.

Q. Okay. Now, didn't you discuss with him and doesn't it appear on this tape about your job and running your department, and didn't he say that, you know, that he had confidence in you to run your department and you said, "I do have freedom of running my department", and he said "Sure you do" and you said "I agree"?

A. That's right. I just said a little while earlier that he hadn't complained or reprimanded me about how I ran my department. That's exactly right.

[p. 52] Q. In describing himself, in describing himself as the chief of this business, didn't he say to you - I guess it is page 14. It is not on the thing.

"I don't know why some of these people around here - I guess it is hard for me for some reason. I never looked at myself like I owned this company, and I am just an employee here like everybody else. I don't look at it like they look at me. I can't understand that.

Then you said, "You sign their paychecks", and he said, "Well, I know that"; correct?

A. He said that.

Q. Then at page 15, didn't he explain to you the business of rentals and what was going on with rentals and what was going on with compensation? Didn't he explain that to you?

A. He said that eventually it was going to have to change, my compensation was going to have to change, but he never told me that until that day.

Q. Did he say to you:

"Now, a certain amount of rentals you are going to increase a certain amount. Probably what I was trying to tell you was a certain amount. Now let's make sure the damn thing is out before you throw it in the garbage can. Teresa, rentals, rental income a lot of times what I am trying to say is that as your customer base increases, your ability for increased rentals is up."

And you said:

"I agree that a certain amount of rentals we" [p. 53] "are going to get because our name is in the phone book. A certain amount of rental calls we are going to get because that's all they do with us is rentals. I also agree that a lot of rentals are due to the fact that salesmen call on them. We sell them new trucks."

And didn't he say:

"We get between 50 to 75 to a hundred new customers a year, and that is a basis for additional rentals. What we looked at was the point I was making was when you came here we had a certain base, okay?"

And you said, "Uh-huh." And he said:

"And we paid you. And what happened is that we have had added all these trucks and a lot of it is your effort, a lot of it is salesmen's effort and a lot of it is simply because we had them

available. What I am alluding to was that at some point in time we will have to look at that nut that we put you on originally. We'll have to change the commission plan to some degree. What degree that will be, I don't know, but sometime in the future as you can see if we have a hundred rental trucks, the compensation would be a hell of a lot more than if it had to."

And you said:

"I don't have a problem with that. I understand that."

Is that an accurate statement?

A. Yes, sir.

Q. And at page 17, which is the last page that was furnished to me under my discovery request, you and Charles Hardy were talking about the behavior that went on at the office; correct?

[p. 54] A. Yes, sir. I don't know. I am answering yes, sir. I don't have a transcript.

Q. Well, your lawyer can give you one if he wants to.

A. Okay.

Q. Didn't he say to you - and he didn't know he was being taped; right?

A. That's correct.

Q. "Well, I think you have been taking it personally. I have heard Jay say some things and I have said some off color things to you that probably I shouldn't have said."

MR. VENICK: Your Honor, I object to the hearsay within the document.

"I didn't mean to hurt" -

MR. VENICK: Hearsay.

THE COURT: Not being offered for the truth of the matter. Just being offered that it was said. Go ahead.

MR. CHERNAU: I don't know where I am. Can I start over?

THE COURT: Yes.

MR. CHERNAU: I will do it fast.

THE COURT: All right.

Q. "Well, I think you have been taking it personally. I have heard Jay say some things and I have said some off color things" [p. 55] "to you that probably I shouldn't have said. I didn't mean it to hurt you. I never - if I had seriously wanted to have a sexual encounter with you, I guarantee you one thing. I never would have alerted the company that we were going to the Holiday Inn. Those things are just said and they weren't intended to be taken personally which you take personally."

Is that an accurate statement?

A. I did take them personally. Yes, sir. I did.

THE COURT: Was that the words spoken by Mr. Hardy and by you in that conversation? That's really his question.

THE WITNESS: Part of it is, yes, sir. What he read was spoken, yes, sir.

A. But there are a lot of things that obviously were spoken that you didn't read, Mr. Chernau.

Q. Feel free to put it all in at any time you like and let the Court read it or listen to the tape.

Fact is - let's get back to business - is that Forklift sells batteries, don't they? Part of the business is selling batteries?

A. Forklift Systems is not or at least they weren't when I was employed there a battery distributorship, no, sir. They purchased electric - they purchased batteries from other from battery representatives for their electric lift trucks. They are not in the battery business. They do not service them, nor do they sell them [p. 56] directly. They have [sic] haven't got a franchise. They buy them from battery people.

Q. Let me see if I can ask you a simple question. Forklift Systems and your husband's business, Cellular Power, called on the same customers, didn't they?

A. Not all the same customers.

Q. Not all, but a lot of the same people were called on?

A. If a customer uses electric lift trucks, my husband would call on them, yes, sir.

Q. Thank you. Now on this travel business about the cars and trucks or whatever.

A. Okay.

Q. You were allowed mileage, weren't you?

A. Yes, sir, I was.

Q. Did you ever put in a request for any mileage?

A. Yes, sir, I did.

Q. Were you paid the mileage?

A. Yes, sir, I was.

Q. Well, did you ever put in for mileage and you weren't paid?

A. No, sir.

Q. Now let's talk about the treatment. In your discovery deposition I asked you specifically, "You are not saying that anyone really harassed you sexually. What you [p. 57] are alleging is a hostile sexual environment." Is that an accurate statement?

A. I think I did allege that someone sexually harassed me. That's why we are here, Mr. Chernau.

Q. Let me see see if I can refresh your memory about why you think you are here.

THE COURT: Let me see if I can straighten this line of questions out, Mr. Chernau.

The law under Title VII, Mrs. Harris, is that with respect to these types of cases based on sex, there are two types of sexual harassment. One is what's called the quid pro quo that courts recognize. That is that sexual favors are demanded of the female by a male supervisor or employer in return for an employment benefit such as being hired.

THE WITNESS: Oh.

THE COURT: Or such as getting a raise or such as getting some other benefit that the female seeks in the employment. That's called I give you this if you give me sex.

The other is a sexual harassment hostile environment type case where there is no demand that in order to make an advance or get pay that you, the female, perform sexual acts with respect to the male employer but that just the work place is so hostile, go around pinching [p. 58] people or making them bend over putting reaching and retrieving coins out of front pockets and things like that, and that it just becomes so uncomfortable even though it is not a requirement in order to maintain employment or to get a raise, that type of case. So that's what he is talking about.

THE WITNESS: Okay

THE COURT: Now since she knows what the legal terms are and what two kinds of cases the law recognizes under Title VII, you can reframe your question.

MR. CHERNAU: Thank you.

Q. So what you are saying is that the environment itself you were uncomfortable in the environment, that it was a hostile environment. That's what you are saying, isn't it?

A. It was hostile, yes, sir.

THE COURT: As I understand your lawsuit and your pleadings, there never was - you do not allege that there ever was by Mr. Hardy or anybody a requirement

that you perform sexual acts in order to maintain your employment?

THE WITNESS: No, sir.

THE COURT: Or to get a raise or more commissions?

THE WITNESS: No, sir. I never alleged that.

[p. 59] THE COURT: All right.

Q. Now, going on with this hostile environment, there were a lot of jokes made and told?

A. Yes, sir.

Q. And there were a lot of jokes told after work when you sat around and drank with the boys, wasn't there?

A. Yes, sir.

Q. And in regard to going to get coffee, anybody would bring coffee in if somebody else was going to get coffee to get me a cup of coffee, anybody would get it, wouldn't they? I mean, that's not a big thing?

A. There is a difference, Mr. Chernau, in everybody sitting there and asking someone to go get coffee and being specifically called from your office to go get coffee.

Q. And you never saw any man buzzed and said, "Could you bring some coffee? We are in a meeting"?

A. No, sir.

Q. You felt that you were being harassed?

A. I didn't consider that - we are getting back to the sexual favor thing. I just didn't like it. I didn't think I

should have to go stop what I was doing in my office to go cater to Charles Hardy needing coffee.

Q. All right.

A. Dick Reed wasn't asked to do that nor was David [p. 60] Matthews, and we both - the three of us sat fairly closely to Mr. Hardy.

Q. Did you often have management meetings at Holiday Inn that's near the office?

A. We did have them at Holiday Inn sometimes, yes, sir.

Q. So you took - we'll talk about your raise at Holiday Inn, that statement, as a dead serious statement, not a joke because you always went over there for your meetings anyway?

A. I didn't say that Mr. Hardy asked for sexual favors. Mr. Hardy said that to me, "Let's go to the Holiday Inn and negotiate your raise." We didn't go to the Holiday Inn to have reviews. They were held at the office.

Q. Do you know who J. R. Greg is?

A. Yes, sir, I do.

Q. Isn't J. R. Greg the man that started the funny line about getting quarters out of someone's pocket?

A. I don't recall that.

Q. Were you never told by anyone that that was a joke line around the office because of an event that occurred with a man who was a homosexual?

A. I don't re - I don't remember that. That could have happened, but I don't recall J. R. Greg ever saying that.

[p. 61] Q. Did you recall anybody explaining why that's a funny line?

A. No, sir.

Q. To them at least where it emanated from?

A. No.

Q. Never heard that that was a line used around the office as a joke?

A. It was - I did hear it was a joke. I mean, Charles Hardy said it was a joke. But I never heard that story that I recall, no, sir.

Q. But everybody knew it was a joke. Everybody knew it was a joke, didn't they, they laughed? Isn't that correct?

A. I didn't laugh.

Q. But you just said everybody knew it was a joke, but you don't know where the joke line came from, right? Is that a fair statement of what you just answered?

A. I said that Mr. Hardy said it was a joke and that I did not find it humorous and I don't know where it came from.

Q. All right. Now, do you remember a young girl named Terri Curtis?

A. Yes, sir, I do.

Q. Wasn't it Terri Curtis who volunteered one day in I think the coffee room about the effect of corn on the [p. 62] growth of a woman's bosom?

A. She said that, yes, sir.

Q. So that was something she said and everybody laughed, didn't they?

A. Terri Curtis told us that story. Terri Curtis was a little girl from Cheatham County from the country. She was 19 years old. And someone had told her that story, and in her naivete she asked us because she wanted to know if that was in fact true or not. That - she did say that. She told us that story. But Terri Curtis did not ask me if I ate corn or ask Charles Hardy if he ate corn or anybody else.

Q. When Terri Curtis told that story and had asked, did you laugh? Did you think that was funny that she had asked that in her naivete?

A. I thought that was funny that she asked that, yes.

Q. Now, Mr. Venick - and I want you to think back a minute. Mr. Venick asked you what effect all this had on you.

A. Yes, sir.

Q. And you said you drank all the time and you cried and that you were devastated by this conduct that you didn't complain of for two and a half years. And then he asked you this: "You had no problems I mean other than the [p. 63] work, you had no problems with your family at that time?" And you answered no, didn't you?

A. That's correct.

Q. Is it not true at that time that you were going through and may continue to go through a terrible thing with one of your sons? About that time hadn't your son been arrested for stealing and hadn't Mr. Hardy told you to call me about it?

A. No.

Q. No?

A. That's a lie.

Q. That's a lie. All right. How many sons have you got?

A. I have got two sons.

Q. What are their names?

A. Their what I call them or their legal name?

Q. Legal name.

A. Ronnie Lee Nixon, Junior.

Q. Wait just one second. Okay. And who is the other?

A. Jonathan Trever Nixon. And that's E-R, not O-R.

Q. And not one of these boys at that time not one of them were in any difficulty with stealing or dope or anything?

[p. 64] A. My oldest son was asked by a friend to - he was 18 to pawn a camera for him. The guy that asked him to wasn't 18, and my son did it. And as it turned out, it was stolen. There were no charges brought against my

son. He was never arrested. I did tell that to Mr. Hardy in confidence because I had to leave to go home. And I don't think when that happened, which was January, February of 1987, I don't think Mr. Hardy knew Mr. Stan Chernau at that time.

Q. In May or August of 1987 or any time thereabouts or during the period of time we are talking about in 1987, did you have a son that got into any difficulty with the law?

A. Pardon? Would you ask that again?

Q. Yeah, I said it too fast. During 1987 did any of your children have any trouble with the law?

A. No, sir.

Q. Okay. Now, as I understand it, you decided you were going to resign. You wrote a letter and you gave it to Dick Reed?

A. That's true, yes, sir.

Q. Why didn't you give it to Charles Hardy?

A. I didn't want to talk to Charles Hardy any more. I was so mad and upset with Charles Hardy that it was all I could do to walk in the door. I didn't want to [p. 65] talk to him. I didn't want to look at him. And I had nothing else to say to Mr. Hardy. I made myself perfectly clear in August. And he promised and he didn't keep his promise, and I had nothing else to say.

Q. Now, Mr. Hardy was your immediate supervisor; right?

A. That's correct.

Q. Why didn't you write "Charles Hardy" on an envelope and go slide it under his door? Why did you go to Dick Reed?

A. I wasn't going to be there the next day. I couldn't. I would leave before Charles Hardy.

Q. Is that your explanation?

A. Yes, sir.

Q. Now, in regard to bonuses, it seems to me that when you filed your EEOC claim you had some things that you said. For instance, is it your testimony today that you did or did not receive a bonus in 1987?

A. I did receive a bonus in 1987.

Q. Was the check - you don't remember the check number. Was it in the amount of 3,000 dollars?

A. Yes, sir.

Q. Was it written on Sovran Bank?

A. I - yes, sir.

Q. Was it on or about June 12, 1987?

[p. 66] A. I don't remember. It was some time in June that we got it.

Q. But you told the EEOC that you hadn't gotten it, didn't you?

A. I didn't say I didn't get it.

Q. You didn't. What did you tell the EEOC?

A. I told the EEOC that mine wasn't the same as everybody else's.

Q. Okay.

A. I didn't say I didn't get a bonus. I have never said I didn't get a bonus.

Q. Weren't you making more money than most of the people out there?

A. Mr. Chernau, I don't know what they made. They didn't tell me how much money they made, and I didn't tell them how much I made. I didn't have any way of knowing that.

Q. Well, then how do you know you weren't being paid the same basis or the same amount as the other people?

A. Charles Hardy told me my bonus was different. That's how I knew it.

Q. Let me ask you this question. Let me ask you this question. If the facts establish from the hard numbers from these financial statements and everything been written down around here and gone through with with [sic] [p. 67] discovery, if those numbers show that in fact you were making more money than most of the people out there, most of whom were males, would you then change what you think? Would that affect you in any shape, manner or form about what you think about your compensation?

A. It is not still not going to take - it is not going to change the fact that I was to be given a performance review. I was not. It is not going to change the fact that my bonus was less than the other tenured managers. That's not going to change anything.

Q. All right. We are now down I guess reducing it down to the bonus review, and I am going to ask you going back to the tape transcript -

A. There is not a bonus review.

Q. I thought you just said bonus review?

A. No, sir. I said bonus. Your bonus is entirely different than your review.

Q. Right. And that's what I was going to point out to you. There is no such thing as a bonus review. It is just a review.

A. You receive a review, exactly.

Q. Okay, so we are on the same wavelength here now, and I am going to you ask you if on the tape you didn't say "I didn't get a review" and he said "Yes, you did. It is not a formal thing"?

[p. 68] A. Uh-huh.

Q. Didn't he say that: "It is not a formal thing"?

A. Yes, sir, he said that. But on down through the tape, Mr. Chernau, if you will read the rest of it to the Judge -

Q. Your lawyer -

A. - he admits I didn't get a review.

Q. That's your interpretation of the tape. Feel free to give the tape in any time.

A. He says it.

MR. VENICK: Can Mr. Chernau please tell me where he is reading from the transcript?

MR. CHERNAU: Yes, but in order to save time I will show it to you when I get a chance.

MR. VENICK: I'd like to know right now.

THE COURT: Show it to him right now.

Q. Do you know where it is on here?

A. No, sir, I don't.

Q. You agreed it was on there though, didn't you? One second. I'll find it.

MR. CHERNAU: All right, page 2.

THE WITNESS: May I have a copy, please? Thank you.

Q. I'm at the bottom of page 2. Charles Hardy [p. 69] said:

"Q. You did get a review.

"A. When?

"Q. You and I sat down in here. I mean, a review is not something elaborate. I don't know what you have got in your mind as far as a review, but you and I sat down and talked it over what were we going to do with this year. Now, Teresa, we did.

"A. When? I never got a review.

"Q. Yes, you did.

"A. No, I did not."

You are talking knowing you are taping, and he is talking not knowing he is being taped; right?

A. Him telling the truth has got nothing to do with whether or not I got a review. He also says on page 3 I said, "I never got a review." He says, "Well, I'm sorry for that."

Q. All right. Now the tape goes off. You get up out of the office. He is trying to tell you think about it. Don't quit like this. It is not a smart thing for you to do, and if you come in tomorrow morning and say you are going to quit anyway, don't worry about it. Right, that's what's happening right here in that room?

A. That is what he said.

Q. And didn't he walk out of the room with you out of his office as you were going to make your way to the front door and exit the building?

A. Don't recall that.

Q. I am not going to go through the discovery [p. 70] because it takes too much time, but I will ask you this. Did he not encourage you to stay?

A. He told me that this would stop. That he was sorry. And I said I would think about it.

I came back to work. I did my job.

Q. Before we get.

A. I -

Q. Before we get there, still got you leaving the building.

A. I did what I promised to do, Mr. Chernau; Mr. Hardy did not.

Q. Just a moment. I am trying to get you out of the building.

MR. VENICK: Your Honor, can the witness finish her testimony?

THE COURT: Yes, I will accept the answer, Mr. Chernau. Now then you may ask another question.

Mrs. Harris, let me just advise you just respond to his questions and answer it just as directly as you can and let it go at that. Your lawyer will get up on redirect and I am sure will ask you questions and allow you to explain these things.

THE WITNESS: Thank you.

BY MR. CHERNAU:

Q. He was encouraging you to think about it and [p. 71] felt it would probably be a mistake if you quit, didn't he?

A. He did say that to me, yes, sir.

Q. And when you got home that night you talked about it with your husband, didn't you?

A. Yes, sir, I did.

Q. And did you want to resign?

A. I loved my job.

Q. Did you tell your husband that your inclination was to resign and he talked you out of it?

A. I told my husband that my gut feeling was that it wouldn't stop and I was afraid that it wouldn't stop. But

that he did – Larry said, “He sounds sincere”, and I said, “Yeah, he does sound sincere, but my gut feeling is it’s not going to stop.”

Q. Were you married to Mr. Harris in 1987?

A. Yes, sir, I was.

Q. Were you married to Mr. Harris in 1986?

A. Yes, sir, I was.

Q. Were you married to Mr. Harris from April ‘85 on?

A. No, sir, I was not.

Q. Well, during most of the time you were employed at Forklift, were you married to Mr. Harris?

A. Most of the time, yes, sir.

Q. Did you ever complain to –

[p. 72] THE COURT: What was the date you married Mr. Harris? That will stop all those questions.

THE WITNESS: February 28, 1986.

THE COURT: All right.

Q. From February ‘86 to October ‘87 –

A. Well, not until October ‘87, Mr. Chernau. I am still married to Mr. Harris.

Q. Not – I don’t understand.

A. You said from February of ‘86 until October of 1987 when you are talking about my marriage. I am still married to him.

Q. Okay. And your gut feeling is that you should leave. He said you should stay?

A. I was apprehensive about it, yes, sir. And as it turned out, I was right.

Q. I believe that’s all.

REDIRECT EXAMINATION

BY MR. VENICK:

Q. I believe you testified on cross examination about what happened in your meeting with Mr. Hardy; is that right?

A. Okay. Yes, sir.

Q. And Mr. Hardy told you that he would do what with respect to his behavior?

A. He told me he would stop.

[p. 73] Q. And was that a significant statement to you?

A. I believed him. I wanted to believe him. I loved my job and I wanted it to stay that way, but he didn’t stop.

Q. And in the course of the discussion you had with Mr. Hardy, what did he say about his prior behavior?

A. He said he was sorry and he didn’t mean any of it in a demeaning way and he was sorry he didn’t give me a review.

And when I was explaining to him – and this part is not on the tape. When I said, “Charles, would it upset

you, would you like it if men talked to Sandra and Kathy the way you talk to me?", and he said, "No, I wouldn't."

I said, "Well, I don't like it either."

Q. And there is not a full and complete transcript of that conversation?

A. No, sir, there is not.

MR. VENICK: No further questions, Your Honor.

MR. CHERNAU: You may - excuse me. I have no further questions.

(WITNESS EXCUSED.)

* * *

THE COURT: Next witness.

[p. 74] DIXIE SHADRAKE was called, and being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. VENICK:

THE COURT: Once seated, state your full name.

THE WITNESS: Dixie Shadrake.

THE COURT: And spell your last name.

THE WITNESS: S-H-A-D-R-A-K-E.

Q. Ms. Shadrake, you were formerly employed at Forklift Systems; is that right?

A. Yes.

Q. And you held a position as receptionist and worked in the Accounting Department; is that right?

A. Yes.

Q. And you left to take another job; is that correct?

A. Well, I just quit and then I got another job later.

Q. Now, during the course of your employment at Forklift Systems, did you ever observe Mr. Hardy, Charles Hardy, throwing quarters on the floor in front of female employees for them to retrieve?

A. He did it, but he did it as a joke.

Q. How many times did he do it?

A. I don't recall.

[p. 75] Q. Can you describe how it went?

A. No. Everybody just laughed and . . .

Q. What did Mr. Hardy say?

A. That's, I mean, nothing really. Whenever he did it, that was it. Everybody just kind of laughed. It was just a joke.

Q. And did you ever hear him ask female employees to retrieve coins out of his pocket?

A. No, I never have heard him say that.

Q. Did Mr. Hardy ever make any comments about clothing that female employees had?

A. Yeah, I guess. Everybody did if you wore something nice.

Q. What did Mr. Hardy say?

A. If you wore something nice, people would comment on it, not just him.

Q. Did Mr. Hardy ever make a comment about some female wearing tight clothes, tight clothes blouses one day?

A. Yes.

Q. What did he say? I know this is embarrassing to you, Ms. Shadrake, but very important the judge hear this. Only people that are here right now, Mr. Hardy who already knows it, Mrs. Harris who knows about it, judge and some court people. So if you just tell the judge what [p. 76] happened, we'll get through it quickly as possible.

A. He just mentioned about somebody wearing tight clothes and turning down the air conditioning. I mean, that was it. That's the only thing I heard -

Q. Somebody being whom?

A. I don't know who exactly.

Q. Well, was he talking about men?

A. No.

Q. Talking about the women?

A. Yes.

Q. Why do you think he was talking about wearing tight clothes and turning the air conditioning down? What significance you think that would have?

A. Because it would be cold in the room and the woman would have a tight shirt on, tight blouse.

Q. And it would effectuate how their breasts looked through the shirt?

A. Yes.

Q. And that's how you took it?

A. Yes.

Q. Did you ever hear Mr. Hardy make any other comments about any other female's body parts who worked there?

A. No.

MR. VENICK: No further questions, Your Honor.

[p. 77] MR. CHERNAU: Can I ask just from here?

THE COURT: No.

CROSS EXAMINATION

BY MR. CHERNAU:

Q. Did you consider - I am only going to ask you two questions. Did you consider while you were at Forklift Systems that there was a sexually hostile place to be?

A. No.

Q. Was the things that were done there always in a joking manner and understood by everyone to be joking?

A. Yes.

Q. I have no further questions. You may step down, and thank you.

(WITNESS EXCUSED.)

* * *

STEPHANIE VANNIS was called, and being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. VENICK:

THE COURT: State your full name.

THE WITNESS: Stephanie Ann Vannis.

THE COURT: Spell your last.

THE WITNESS: V-A-N-N-S.

THE COURT: Mr. Venick.

Q. Ms. Vannis, you were formerly employed by [p. 78] Forklift Systems; is that right?

A. Yes, sir.

Q. And you worked as I believe Mr. Hardy's secretary?

A. Yes, sir.

Q. And you were terminated from your employment in February of '88; is that right?

A. Yes, sir.

Q. And right now you operate a daycare center in your home; is that correct?

A. Yes, sir.

Q. During the course of your employment did you have occasion to hear Charles Hardy ask female employees to retrieve coins from his pocket?

A. Yes, sir.

Q. Did he do that on a regular basis? Did it happen more than once?

A. Regular as in every day?

Q. No, happen more than once?

A. Yes, sir.

Q. Did it happen on a monthly basis at least?

A. I don't know how many times.

Q. But it happened on a number of occasions?

A. I have heard it more than once.

Q. Was some of that directed towards you?

[p. 79] A. Yes, sir.

Q. Some of that directed towards Teresa Harris?

A. I don't remember him saying it directly to her.

Q. You don't recall seeing that?

A. Correct.

Q. And do you have any recollection of hearing Mr. Hardy say to Teresa Harris, "You are a woman. What do you know?"

A. He could have. I don't remember.

Q. Okay. What about, "We need a man as a rental manager"?

A. I don't remember hearing that.

Q. Now, do you recall giving a statement to the Equal Employment Opportunity Commission?

A. Yes, sir.

MR. CHERNAU: Have we been furnished it?

MR. VENICK: Be furnished it right now.

MR. CHERNAU: May it please the Court, if it is a document being relied on, I should have seen it before now.

MR. VENICK: Not being used as an exhibit; to be refreshed recollection.

THE COURT: Give him a copy.

MR. VENICK: I plan to.

THE COURT: Right now.

[p. 80] MR. VENICK: Okay.

Q. Okay. Ms. Vanns, would you please look at that document. Just look it through.

A. Okay.

Q. And you signed this?

A. Uh-huh.

Q. On the back, I believe?

THE COURT: Answer yes or no. Uh-huh doesn't come up well in the record.

A. Yes, sir.

Q. August 12 of '87?

A. Yes, sir.

Q. In reviewing that document, does that refresh your recollection about anything Mr. Hardy may have said to about "What down [sic] you know; you are a woman"?

A. I do have on there that he said it.

Q. Did it also refresh your recollection about him saying, "We need a man as a rental manager"?

A. Yes, sir.

Q. What is your recollection as it is refreshed now?

A. I would say that he would say it like if - it is hard to remember. It was several years ago. If maybe like something went wrong or something was not exactly the way it was supposed to be or maybe if she made a comment [p. 81] that he didn't agree with.

Q. After that he would make the statement, "We need a man as a rental manager"?

A. Yes, sir, probably.

Q. Now, did you recall Mr. Hardy ever making any comments about female body parts?

A. Like about their bodies?

Q. Like about their breasts or their rear ends?

A. To me or to -

Q. Well, to you or other females.

A. He never made any comments about my body.

Q. Did he ever make any comments about Mrs. Harris' body?

A. Not to me, he didn't.

Q. Did you ever hear him say it?

A. To her?

Q. Yes.

A. No, not that I recall. I don't remember. I am not saying he didn't. I do not remember.

Q. Did you ever hear him say anything to any other females at Forklift Systems?

A. Yeah, I have heard comments that he made about other people.

Q. Would you please tell the Court what those comments were?

[p. 82] A. Like I heard if somebody walked in and had large breasts, I have heard him say, "Boy, she must have ate a lot of corn; she has large breasts" or something like that making a joke about her having large breasts.

Q. Did you hear him say that more than once?

A. Well, I would say if more than one person walked in like that. I mean, I can't count exactly, yes, he said this so many times. If somebody walked in with large breasts and he was standing there, sometimes he would make a comment about it, like I said, joking around.

Q. And was there also an occasion when Mr. Hardy would throw objects or coins on the floor and have female employees pick them up?

A. Yes, sir. Most of them never picked them up.

Q. Did that happen to you?

A. Yes, sir.

Q. Did it happen to Mrs. Harris that you saw?

A. I don't remember him saying it to her. I know he said it to me before.

Q. He said it to other female employees?

A. Yes, sir.

MR. VENICK: No further questions, Your Honor.

CROSS EXAMINATION

BY MR. CHERNAU:

Q. Ms. Vanns, did you find that what was going on [p. 83] around that office while you were there was mostly joking?

A. That's the way I took it when he'd say anything to me.

Q. Did you find it offensive or as a joke when he talked to you about something on the floor or a quarter in the pocket?

A. I felt it towards me as being a joke because usually he would say it like after work when everybody was drinking beer and there was a lot of people there. Personally I didn't take offense.

Q. Did you take offense at any of Teresa Harris's behavior?

A. Well, she worked with me for long periods of time. Yes, I did sometimes; no, I didn't sometimes.

Q. When you took offense at some of her behavior, what kind of behavior was it? How did she behave?

A. Well, I would say like everybody has their good days and everybody has their bad days. Some days we didn't get along. We worked at a close network like she would work here and I worked here, and a lot of times we didn't get along with our work. No, we didn't.

Q. How was her language? Did she curse a lot?

MR. VENICK: Object to that. That's beyond the scope of direct and not relevant.

THE COURT: Do you want to take her as your [p. 84] witness and open it up and go into it, or are you still on cross examination?

MR. CHERNAU: I'll take her as my witness. Makes no difference to me.

THE COURT: She is now his witness.

DEFENDANT'S PROOF

DIRECT EXAMINATION

BY MR. CHERNAU:

Q. How was Teresa's language? Did she use a curse word like every other sentence?

A. Yes, sir.

Q. Yes, sir?

A. Yes, sir.

Q. Okay. And did she have a good attitude or a bad attitude about work and her fellow employees?

A. Some days she had good attitude and some days she had bad.

Q. When she had bad attitudes, how did she conduct herself?

A. Well, she was in bad mood like other people get in a bad mood.

Q. Did it appear to you that she was treated like or conducted herself like one of the boys at the office?

A. A lot of times, yes.

Q. Did you find that anything that was going on [p. 85] there and the jokes that you have alluded to and Mr. Hardy, you didn't find them offensive, did you?

A. No, I did not. Not to me.

Q. You may step down.

MR. VENICK: Excuse me, Your Honor.

THE COURT: Okay. Mr. Chernau, I will tell the witness when to step down.

MR. CHERNAU: I'm sorry, Your Honor. I apologize, Your Honor.

THE COURT: Okay.

CROSS EXAMINATIONBY MR. VENICK:

Q. Just one more question. Of course different people take statements different ways. Isn't that right?

A. That's correct.

Q. And the fact that you weren't offended doesn't mean that somebody else wasn't?

A. That's correct. That's why I said I personally was not offended. That don't mean somebody else was not.

MR. VENICK: No further questions.

THE COURT: Mr. Chernau, anything else?

MR. CHERNAU: Nothing else.

(WITNESS EXCUSED.)

* * *

THE COURT: Next witness. We've got still some [p. 86] time here.

MR. VENICK: Your Honor, at this time I would like to read into the record some matters from request for admissions and interrogatory responses.

THE COURT: All right.

PLAINTIFF'S PROOF (Resumed)

MR. VENICK: First is Defendant's Response to Plaintiff's First Request for Admissions, admission number 3:

"Please admit that Charles Hardy in front of a group of other employees of Defendant and Nissan's representative stated 'let's go to the Holiday Inn to negotiate your raise.' "

Response: "It is admitted that Charles Hardy made a statement to the effect of going to the Holiday Inn to negotiate the raise and that the meetings were held among personnel of the Defendant at the Holiday Inn on numerous occasions and that statement was made in the presence of a number of other employees, some of whom have executed affidavits in regard to this subject matter. Charles Hardy denies any statement was made to the Plaintiff in regard to Holiday Inn that had a sexual harassment basis or in any way was offensive."

MR. CHERNAU: Can I interrupt for one second so I can follow this? You did two waves of discovery, and I [p. 87] want to follow you. I don't know which wave you are on.

MR. VENICK: Defendant's Response for Plaintiff's First Request for Admissions, admission number 3.

THE COURT: Go ahead.

MR. VENICK: Your Honor, the second has to do with response to interrogatory 13, Answer to Plaintiff's Second Set of Written Interrogatories, Request for Production of Documents and Request for Admissions.

MR. CHERNAU: I need to find that.

MR. VENICK: I will wait for Mr. Chernau to find it.

THE COURT: No, go ahead. The Court waits for no one.

MR. VENICK: Question, "State separately the annual salary and bonus to each of the following managers of Defendant for every year beginning January first, 1984."

Answer:

"1. Jay Jackson was a salesman in 1985, '86 and '87 and was not a manager.

2. Tom Means left employment in 1984.

3. Teresa Harris. Objected to on the grounds that this is the Plaintiff in this case and the information is as readily available to her as to the Defendant.

4. Gary Watson was a mechanic receiving" [p. 88] "hourly compensation during the years 1985, 1986 and '87.

5. The question concerning Rose Ann Salisbury is objected to since she did not begin employment until January 22, 1988, after Plaintiff left employment with the Defendant and, therefore, any information is irrelevant.

This objection pertains to the following responses of these interrogatories.

6. Mike Moseley in 1985 received 2400 dollars per month plus a 3500 dollar bonus. In 1986 he received 2400 dollars per month plus 3900 dollar bonus. In 1987, received 2520 per month plus a 4500 dollar bonus. Plaintiff was no longer employed by the Defendant during 1988.

7. David Matthews in 1986 received 2,000 dollars per month plus no bonus. In 1987 received 2100 dollars per month plus 2,000 dollars bonus and did not begin receiving commission until August 31, 1988, after Plaintiff left Defendant's employment.

8. Bennie Lawson received 2470 per month plus a 3500 dollar bonus in 1985, 2470 per month plus a 3100 dollar bonus in 1986 and 2470 per month plus 4,000 dollars bonus in 1987.

9. John Garrett received 2,000 dollars in 1985 and no bonus.

10. Kathy Kernell received 1300 dollars per" [p. 89] "month and no bonus in 1985; 1400 dollars per month plus 3900 dollars in 1986; received 1400 dollars per month plus 4500 dollar bonus in 1987.

These responses are supplementary to interrogatory 10 originally submitted to the Defendant in this cause."

THE COURT: Okay, now your next witness.

MR. VENICK: Dick Reed, Your Honor.

THE COURT: All right. Is this going to be a long witness?

MR. VENICK: He might, Your Honor.

THE COURT: Let's just wait until 1:00 o'clock.

MR. CHERNAU: May I make a statement before we break?

THE COURT: Yes.

MR. CHERNAU: These interrogatories that were just read in, I can't remember if Mr. Venick had

submitted to the Court the stipulation that we have entered into with the chart and the compensation and all that.

THE COURT: That's in.

MR. VENICK: That was the first thing we dealt with this morning, and it did not include any bonus information. That's why I read that into the record.

MR. CHERNAU: Fine.

(A luncheon recess was taken.)

[p. 90]

1:00 p.m.

AFTERNOON SESSION

(Pursuant to the adjournment for the luncheon recess, court was resumed.)

THE COURT: Mr. Reed is your next witness, I believe you said.

MR. VENICK: Yes, Your Honor.

RICHARD G. REED was called, and being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. VENICK:

THE COURT: Have a seat and then state your full name after you get seated.

THE WITNESS: Richard G. Reed.

THE COURT: Mr. Venick.

Q. Mr. Reed, you currently reside in Lexington, Kentucky?

A. Yes.

Q. And you are currently employed by Louisville Lift Truck?

A. Yes.

Q. As their branch manager?

A. Right.

Q. You were previously employed by Forklift Systems from approximately January '87 through April 15 of [p. 91] '88; is that correct?

A. Yes.

Q. And you were the sales manager?

A. Right.

Q. During the period of time your responsibilities were to supervise sales and for a short period of time you had some responsibility for personnel?

A. Yes.

Q. During the time that you were employed at Forklift Systems, did you have occasion to hear Charles Hardy say to Teresa Harris, "You are a woman. What do you know?"

A. Yes.

Q. How often did you hear him say that?

A. I am not sure how many times. It was more than once.

Q. More than a dozen?

A. I wouldn't say that. I don't know.

Q. Did you ever hear him say similar statements to male managers? Not "you are a woman" but similar statements of that type?

A. No, I never did hear him say it.

Q. You ever hear Mr. Hardy make a statement to Mrs. Harris, "We need a man as a rental manager"?

A. Yes.

[p. 92] Q. Did you ever hear him make similar comments again not saying "we need a man" but to male managers?

A. No.

Q. Did you ever have an occasion to observe Mr. Hardy ask Mrs. Harris to reach into his pockets to retrieve coins?

A. Yes.

Q. Where was that done?

A. As I recall it was in the lobby of the building kind of the outer lobby.

Q. Was that done on more than one occasion that you saw or heard?

A. One occasion that I saw.

Q. Did you have occasion to hear Mr. Hardy make other comments to Mrs. Harris of a disparaging nature?

A. Yes.

Q. What kind of comments did you hear him say?

A. Oh, there were comments about her anatomy or something along that line.

Q. Was this again more than once?

A. Yeah, on several occasions.

Q. Did he ever make any comment that you heard - did he ever make any comment to her that you overheard about how she appeared when she was mad?

A. Yes.

[p. 93] Q. What was that comment?

A. Said that she was sexy when she was mad.

Q. Did you ever hear him make other comments to Mrs. Harris with respect to her body parts?

A. Yes.

Q. What kind of comments were those?

A. There again it was about her anatomy.

Q. Do you recall what part of her anatomy those comments may have been?

A. Her rear end.

Q. How did Mrs. Harris seem to respond to these comments?

A. She took exception to it.

Q. To Mr. Hardy?

A. Uh-huh.

THE COURT: That's a yes?

THE WITNESS: Yes.

Q. Now, do you ever recall Mrs. Harris discussing with you her desire to leave Forklift Systems' employment?

A. Yes.

Q. Do you recall why she said she was going to leave?

A. She said she had just had enough of the situation there and decided she wanted to leave.

Q. When you say enough of the situation, do you [p.94] recall what situation she was referring to?

A. Well, as I remember just the situation of trying to deal with the pressure she was getting there.

Q. What kind of pressure are you referring to now?

A. Some of the statements we just covered here a few minutes ago.

Q. Do you recall how many times she spoke to you about leaving?

A. Several times.

Q. And after the first time she spoke to you, did she in fact leave that time after the first time she mentioned it to you?

A. Well, she said she was going to resign.

Q. Okay. Did she say what else she was going to do? Was she going to talk to Mr. Hardy about it?

A. Yeah, she was going to talk to Charles about it, uh-huh.

Q. What happened after Mrs. Harris spoke to Mr. Hardy?

A. As I recall she decided to try it again for a little while longer.

Q. Do you recall why she said she was going to try it a little longer?

A. That she had talked to him and he was going to try to improve his statements to her in that situation.

[p. 95] Q. And she spoke to you some time thereafter?

A. Pardon me?

Q. She spoke to you again about resigning some time thereafter?

A. Yes.

Q. Did she tell you why she was going to resign that time?

A. Yeah, she said he had slipped back into pretty much the same pattern.

Q. Did she give you anything that second time she spoke to you?

A. Yeah, she gave me an envelope and said it contained her resignation.

MR. VENICK: If we could hand the witness Exhibit Number 4.

THE COURT: You may. There it is right there.

Q. Let me hand you a document that's been introduced Exhibit Number 4. And you never saw the letter, did you?

A. No, I just saw the envelope.

Q. Does that appear to be the envelope that you saw that Mrs. Harris gave you?

A. Yeah, appears to be.

Q. Okay. And what did you do with that envelope?

A. I just held it.

[p. 96] Q. And what did Mrs. Harris ask you about the envelope some time thereafter? Did she ask that you return it to her?

A. Yes, I gave it back to her subsequently.

Q. And did she leave after she had given you that envelope the next day?

A. The next day after she gave me this envelope? I am not sure if it was the next day or not.

Q. Well, did she mention to you whether she was going to resign immediately after she gave you the envelope and changed her mind again?

A. Are we talking about the second time?

Q. Second time.

A. Yeah, she said she didn't feel like there was any use going on.

Q. And then she left some time thereafter?

A. Yes.

Q. Did she tell you why she wasn't leaving the day she gave you the letter?

A. Why she was not leaving?

Q. Going to leave that very day?

A. Well, I remember her statement was she said, "Well, it is just no use. He is still making the same remarks to me."

Q. How would you describe Mrs. Harris's job [p. 97] performance?

A. I'd say very good.

Q. You had occasion to observe Mr. Hardy's attitude towards women while you were employed there?

A. Yes, I guess I could say that.

Q. How would you describe Mr. Hardy's behavior towards Mrs. Harris?

A. How would I describe it?

Q. Yes.

THE COURT: His behavior is what he asked.

Q. Towards Mrs. Harris?

A. Somewhat callous. Somewhat provocative. I don't know how to describe it.

Q. Would you describe it as sexist?

A. Yeah, I would.

Q. No further questions.

CROSS EXAMINATION

BY MR. CHERNAU:

Q. Mr. Reed, were you sworn just before you sat down?

A. Yes.

Q. You are here from Kentucky voluntarily, are you not?

A. Yes, I am.

Q. How many times have you come to Nashville for [p. 98] the various litigations that's been going on between these people and the companies?

A. Three or four, as I recall.

Q. Three or four. And each time you came down voluntarily?

A. Yes.

Q. Now, Mr. Reed, you were terminated at Forklift Systems, were you not?

A. The job was abolished.

Q. And you were terminated, were you not?

A. The job was abolished. If there is no job, I haven't got any job.

Q. Did you quit?

A. No, I didn't quit.

Q. Then were you terminated?

A. I am saying the description given to me at the time was the job was abolished.

Q. And you were unhappy about that, were you not?

A. Yeah, I was unhappy about it.

Q. And you remain unhappy today, do you not?

A. Yes.

Q. And I don't believe that you care for Mr. Hardy very much, do you?

A. No, I don't.

Q. Thank you. When you heard Teresa Harris [p. 99] complain about Mr. Hardy's conduct and you say that she took exception to it, and I take it then for - well, let's see. You were there for nine months while she was there; is that correct?

A. That much or longer.

Q. Well, you came January of '87; she left October first '87.

A. All right.

Q. Sir?

A. Okay.

Q. Sir?

A. Yes.

Q. You have to speak up because she has to take it down. And during that nine months you heard her on occasion say to him "Don't talk to me like that" or things like that or "I don't like that"?

A. Yeah, things of that sort.

Q. Things of the sort that she would complain to him and you would hear her say that?

A. Yes.

Q. Things like "Don't say that to me" and "I don't like that"?

A. Yes.

Q. Are you sure of that?

A. I am positive of it.

[p. 100] Q. Have you – did you read the tape of the conversation that took place between Mrs. Harris and Mr. Hardy? Did you listen to the tape or read the transcript of it?

A. No, I did not.

Q. Did you know that there was a conversation taped?

A. Yes, I did, uh-huh.

Q. Were you in those groups in the group that sat around two, three times a week after work and drank beer and told jokes?

A. Yes.

Q. And was Teresa Harris present many times?

A. Many times, yes.

Q. In the litigation that went on between – you familiar with the litigation between Mrs. Harris's husband, Larry Harris, and Cellular Power and Charles Hardy and Forklift Systems?

A. Yes.

Q. Do you recall the first time you came here to be a witness voluntarily what case it was?

A. I remember coming here, yes.

Q. That's what I meant. Do you recall what case it was the first time you came?

A. I can't pin it down for you exactly.

[p. 101] Q. Do you recall whether you testified or not?

A. No, I didn't testify at that time.

Q. I am going to try to refresh your memory. Did you come down for General Sessions in that little courthouse behind the big courthouse?

A. Yeah, I was over here just across the bridge. I am not familiar with streets any more.

Q. That's the place. And do you recall that there was that case where Cellular Power, Mr. Harris's company, had sued Forklift alleging that monies was owed to Cellular Power by Forklift in regard to equipment and battery rentals? Recall that?

A. Yes.

Q. Now, do you recall that that case was tried, it was appealed and tried in Circuit Court? Do you remember that case?

A. Yes.

Q. Do you recall whether you testified in that case?

A. I believe that is the one I testified at, yes.

Q. You believe that's the one you testified at. Now, weren't you here also when we tried a case in Circuit Court before Judge Gayden? Is that the same case? I am getting mixed up myself.

A. Well, -

[p. 102] Q. How many times have you testified? Did you only testify once?

A. I believe I only testified once, yes.

Q. I couldn't remember. You looked familiar, but I couldn't remember.

A. Yes.

Q. That's that same case; correct?

A. I believe it was, yes.

Q. Were you also voluntarily here from Kentucky in the case that was tried in Chancery Court when Charles Hardy had to sue Cellular Power and Larry Harris on a note that they had defaulted on? Do you remember being in Chancery Court for that, Chancellor Kilcrease's court? Do you recall that?

A. Yes.

Q. Do you recall whether you had testified in that trial?

A. I can't be positive of that. We have had several appearances and I have waited and stood by for the cases, and I can't remember how many times I testified.

Q. Well, you showed up as a witness whether you testified or not?

A. Yes.

Q. And do you recall that that was a case of a suit on a note that Mr. Harris, Cellular Power, had owed to [p. 103] Mr. Hardy and Bennie Lawson?

A. One of those was regarding a note, yes.

Q. You were prepared for that trial to testify as a witness?

A. Yes.

Q. Do you recall that the default on that note - that that lawsuit was filed because the default took place right about the same time that Mrs. Harris left Forklift Systems? Do you recall the time?

A. What is the question?

Q. Okay, that's confusing. There was a suit on a note that you showed up to testify to?

A. All right.

Q. Now, the people bringing the suit were Charles Hardy and Bennie Lawson.

A. All right.

Q. They were bringing the lawsuit over here against Larry Harris and Cellular Power.

A. All right.

Q. That's the one we were in Chancelor Kilcrease's court. When you came over here to testify. Do you recall the facts being that Mr. Harris and Cellular Power had stopped paying the note, had defaulted on the note owed to Charles Hardy and Lawson at or around the same time that Teresa Harris left Forklift Systems?

[p. 104] A. I have no knowledge of when they stopped paying on a note.

Q. You don't remember that fact?

A. I wasn't in position of the facts about when they stopped payment on a note.

Q. You knew they had stopped payment on a note?

A. I knew there was a dispute about the note payments.

Q. And that's why you were here to testify?

A. In that action whatever it was going to be.

Q. What did you know about it that you were going to testify to about that note?

A. I had some knowledge of the inventory and so forth as it went back and forth between the two companies.

Q. And for the nine months that you were there while Teresa Harris was there, January '87 to October

first, '87, it is your testimony that you heard her take exception many times to Mr. Hardy's comments and actions?

A. Yes.

Q. If Mrs. Harris testified that it was not until around July or August of 1987 that she complained to Mr. Hardy, do you think she just forgot about it if that's what she testified to? Do you think she forgot that she had done it but you had heard her?

A. I have no idea. I don't know.

[p. 105] Q. I have no further questions.

THE COURT: Anything further?

MR. VENICK: One second, Your Honor.

REDIRECT EXAMINATION

BY MR. VENICK:

Q. Mr. Reed, you were very forthright in your direct testimony to state that you don't care for Charles Hardy?

A. Uh-huh.

Q. That's correct; is that right?

A. Yes.

Q. But you don't dislike him so much that you would lie, would you?

A. No. I don't lie.

THE COURT: Why was your job done away with? Were you ever told?

THE WITNESS: Something to do with the level of business and what he regarded as possibly my performance in that regard.

Q. And you testified on direct that Mrs. Harris had complained about and took exception to statements made by Charles Hardy?

A. Yes.

Q. Did she make those statements to you or to Mr. Hardy?

[p. 106] A. Well, she made them frequently different places in the area of the business, my office part of the time or someplace else.

Q. So when you were testifying earlier you were saying that you heard those statements as well as some of the statements that were made in response to Mr. Hardy?

A. Yes.

MR. VENICK: I have no further questions, Your Honor.

MR. CHERNAU: I have no further questions.
(WITNESS EXCUSED.)

* * *

THE COURT: Next witness.

MR. VENICK: One second, Your Honor.

Your Honor, that concludes the Plaintiff's proof.

THE COURT: All right. Mr. Chernau, the Defendant's proofs.

MR. CHERNAU: All right, Your Honor. I just wanted to take one quick look to see who he didn't call.

All right, the Defendant calls Charles Hardy.

MR. VENICK: One second, Your Honor, if I may step out a moment.

THE COURT: Come around, Mr. Hardy.

* * *

[p. 107] IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

TERESA HARRIS,)	
)	
Plaintiff,)	
)	
vs.)	No. 3:89-0557
)	
FORKLIFT SYSTEMS, INC.,)	
)	
Defendant.)	

TRANSCRIPT
OF
PROCEEDINGS
July 23, 1990
Volume 2 of 2

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[p. 110] The above-styled continued to be heard on July 23, 1990, before the Honorable Kent Sandidge, III, Magistrate of the United States District Court for the Middle District of Tennessee, Nashville Division, when the following proceedings were had, to-wit:

DEFENDANT'S PROOF (Resumed)

CHARLES HARDY was called, and being duly sworn, was examined and testified as follows:

THE COURT: Have a seat and once seated state your full name.

THE WITNESS: Charles Thomas Hardy.

THE COURT: Mr. Chernau,

MR. CHERNAU: May I ask this, Your Honor, prior to starting Mr. Hardy's testimony and the Defendant's defense. It appears to me - and I know that the Court likes to hear both sides, but it appears to me that the Plaintiff has not introduced evidence that rises to the level of maybe that I need to put any proof on. The tape explains what occurred. They chose not to present the tape.

The two witnesses they call turned out to be witnesses for the defendant, Dixie Shadrake and Stephanie Vanns. And appears to me that it would be proper even knowing the overview of these type cases to move for dismissal on the grounds that it just hasn't risen to the [p. 111] level where any proof is necessary

THE COURT: I will keep it under advisement, but I want to hear all the proof.

MR. CHERNAU: Okay, fine. Okay.

DIRECT EXAMINATION

BY MR. CHERNAU:

Q. State your name and your place of business for the record, please.

A. Charles Thomas Hardy, President, Forklift Systems, Incorporated.

Q. Now, you are involved in more than one business?

A. Yes, sir.

Q. And I want to make it crystal clear for the record. One business is Forklift Systems, Inc.?

A. That is correct.

Q. All right. That's a Tennessee corporation?

A. Yes, sir.

Q. That's engaged in the business of?

A. Selling and servicing, leasing - parts and service and sales of lift trucks basically and related items.

Q. All right. Let's put that right over here. Now, in Tennessee under another corporation you are engaged in the business of leasing?

[p. 112] **A.** That is correct.

Q. That's leasing forklifts?

A. That is correct. Leasing, renting, anything that's related to that.

Q. And the name of that corporation is what?

A. Forklift Systems Leasing Corporation, Incorporated.

Q. Now I am going to take that and put that over here.

Now, you are also engaged in a business in the State of Kentucky; is that correct?

A. That is correct.

Q. In a Kentucky corporation?

A. That is correct.

Q. What is the name of that?

A. Forklift Systems of Kentucky, Incorporated.

Q. That corporation is not a defendant in this case?

A. No.

Q. The reason I am trying to get this clear is financial statements have been reviewed and numbers reviewed, and I want to ask you are these financial statements what's called consolidated statements of all three companies?

A. No, they are broken out. I have got Forklift [p. 113] Systems Leasing Corp. and then I have got Forklift Systems, Inc.

Q. What about Kentucky?

A. They are not in there.

Q. Kentucky is not in there?

A. No, sir.

Q. There are no numbers in there?

A. No, sir.

Q. Now, did Teresa Harris, was she compensated on any sort of things that went on, business transactions that went on with the Kentucky corporation?

A. No, sir, she wasn't.

Q. Just this?

A. Just the Tennessee operation.

Q. Okay. And we have entered by stipulation and you have in front of you some information regarding compensation of the various employees; right?

A. Right.

Q. Now, you understand what this lawsuit is about?

A. Right.

Q. You understand what they are saying about her compensation not being the same?

A. That's correct.

Q. You have helped me with all these numbers and heard me examine her; is that correct?

[p. 114] A. Yes, sir.

Q. Now, I want you to take a moment and explain to the Court - and I don't know if you need to go to the board or not - exactly what Teresa Harris's position was compensation-wise compared to the other employees. Now I want to -

MR. CHERNAU: May I approach the witness?

THE COURT: Yes.

Q. This is going to be very helpful so I want you to do it very clearly.

A. Talking about the sheet here?

Q. Yes, that we entered by stipulation. Now, on that stipulation there is a heading says Bonus. Now, did you under subpoena bring checks evidencing the bonuses so these spaces could be filled in?

A. Yes, I did.

Q. All right, where are they? Just go slowly and don't throw the papers everywhere.

A. I have got copies of the checks and the check register from various years.

Q. Now, it says in the stipulation that for the extent that there are no figures included within a particular category the parties have not been able to stipulate to that category. Now, that category if the Court is looking at the stipulation - those are the [p. 115] checks. Turn to this. As bonuses?

A. Yeah, this is the bonus checks and check register for each.

Q. First I want to ask you a broad question. I don't want to get too tedious. I want you to explain to the Court exactly what the picture is there, all right?

A. All right.

Q. Is it true that Teresa Harris was being paid, was receiving more money than most of the other employees?

A. Yes, that is true.

Q. Who were males?

A. That is true.

Q. I guess females too?

A. Yes.

Q. What was her position?

A. She was rental manager.

Q. Was she rental manager the whole time she was there?

A. Yes, she was.

Q. Okay. Now, if you would - and remember, now, I want you to explain this so that Mr. Venick can understand it and so the the [sic] Court can understand it. By looking at that stipulation explain what those figures reflect and what's the significance of them in regard to, in regard to the total amount of compensation Mrs. Harris [p. 116] was receiving as compared to other employees. And you may use the bonus checks also.

A. Again I am not sure I have that sheet in front of me. I have got the bonus checks.

Q. This is the stipulation.

A. All right, the bonuses, let me just go through those.

MR. VENICK: Your Honor, I don't have a copy of those documents.

THE COURT: Well, he is starting with the stipulation.

MR. VENICK: The bonus checks.

THE WITNESS: Well, you subpoenaed these. I have the copies.

MR. VENICK: I didn't call you as a witness.

MR. CHERNAU: He got them because they were subpoenaed and we were going to use them right now. May I proceed?

THE COURT: You don't have copies?

MR. VENICK: No, sir.

THE COURT: He doesn't have copies.

THE WITNESS: He can have copies of that. There is the checks. I will just keep the sheets.

MR. CHERNAU: They reflect what's on the checks?

[p. 117] THE WITNESS: Right. Wait a minute, these are '89.

MR. CHERNAU: This is what I should give him?

THE WITNESS: Right.

MR. CHERNAU: Here you go.

BY MR. CHERNAU:

Q. All right, starting again now - and again I don't want to get too tedious, but let's explain why it is based upon the stipulation and the bonus checks that Teresa Harris was being paid as much or more than most of the other employees?

A. Okay. I am going to deal with 1987 only? That was the year that she filed the complaint, or from -

Q. Well, -

A. Let me do 1987.

Q. All right, do 1987 first.

A. 1987, Your Honor, the Comptroller who was a male income was 2470 dollars a month. He received no bonus.

1987 Kathy Kernell, who was the office manager at the time, her salary was 1300 dollars a month and she received a bonus of 4,500 dollars.

Q. That's your daughter; right?

A. That is my daughter, that is correct. The service manager in 1987 had an income of [p. 118] 2,520 dollars a month. He got a bonus of \$4,500, and he was a male.

Kathy was a female. First one was a male.

The parts manager was David Matthews. He had an income of in '87 of 2100 dollars a month. His bonus was 1800 dollars, and he was a male.

Dick Reed, who was the sales manager, had a salary of \$3,000 a month and no bonus, and he was a male.

The rental manager up through October first of that year was Teresa Harris. She got a bonus check of 3,000 dollars and her income, according to her W-2 form, was 2,605 dollars and 93 cents a month, which would make her make more than all but Dick Reed, the sales manager, in salary, base salary and income.

Q. Is that 1987?

A. That's 1987.

Q. All right, she has alleged that she was paid upon a different basis from the other managers. That's what she alleges in the EEOC.

A. The only difference was she was the only one - she was the first one to go on salary plus commission.

Q. So she was paid on a more favorable basis as far as making more money?

A. Yes, that's correct.

[p. 119] Q. So when she says paid upon a different basis, that's true. The thing she didn't say it was on a more favorable basis; is that accurate?

A. That's true.

Q. Now, '87 is the year that she is complaining about; is that correct?

A. Yes, sir.

Q. Now, you have the numbers for '86?

A. Yes, sir.

Q. You have those numbers also and you were asked to bring checks and all that and you brought them?

A. Yeah, I did that, right.

Q. Okay. During her employment there, was she treated differently by way of compensation than any other manager?

A. Only difference would be is that she was the only one on commission. She had an opportunity to increase her pay, and the other ones didn't.

Q. Now, they also have been saying things -

THE COURT: She was the only manager on base salary plus commission?

THE WITNESS: That is correct.

THE COURT: Smaller base salary but opportunity for commissions?

THE WITNESS: That's correct, yes, sir.

[p. 120] BY MR. CHERNAU:

Q. And the end result was how did she compare to these other people?

A. She made a lot more than most of them.

Q. Who made more than she did?

A. It was pretty close, but Dick Reed was making a little bit more than she was. She was making more than the comptroller and parts manager.

THE COURT: And he was just on base salary?

THE WITNESS: Yes. Everybody else was on base salary.

THE COURT: Except Mike Moseley?

THE WITNESS: No, Moseley was not on at the particular time 1987.

THE COURT: In '88 he went on base salary plus commission?

THE WITNESS: That's right.

BY MR. CHERNAU:

Q. After she left. But even now I don't think he is making as much as she made?

A. No, he is not.

Q. Even now after she's gone he's not?

A. No.

Q. Explain to the Court what the ideas of automobiles to various employees. Just do it in your own [p. 121] words and do it quickly and succinctly.

A. Basically the only people that are furnished automobiles are the people that are required to drive a tremendous amount of miles per year. Economically after a person drives 10, 12, 14 thousand miles a year, it is more economic to furnish a vehicle than to give mileage. Everybody was on 18 cents a mile with exception of Mike Moseley had a pick-up truck and was on 24-hour call as a service manager.

Q. Wait just a minute. Mike Moseley was on 24-hour call as what?

A. Service manager.

Q. So he had to have a truck; is that right?

A. Right. He was furnished a pick-up truck and he had to come in on weekends and everything else.

Dick Reed was furnished an automobile because he was responsible for sales in two states which would require a lot of mileage.

Q. That's the man who just testified?

A. Right, that's correct.

The only other person furnished a car was in 1987 after we opened the Louisville branch. We furnished Kathy Kernell a car because she was going to Kentucky and closing out the books each month. So it required her to travel to and from Kentucky. Everyone else got 18 cents a [p. 122] mile. The hundred dollars from Bennie Lawson and fifty dollars for Kathy Kernell was when they were on different jobs and they were going to things like have to go get tags at Metro, post office, daily runs to the bank, to the printer's and those type things. So instead of them trying to keep track of their mileage all the time, we just gave them a [truck fee sic] flat fee.

Q. Does that cover automobiles, trucks and who had them?

A. Yes.

Q. Okay. Let's talk a minute about reviews. First of all describe to the Court what means are used by you in making a judgment on someone's performance. I am trying to get around to the review aspect.

A. Well, basically it is reviews are pretty informal at Forklift Systems. They are not something where we have flow charts and diagrams and analysis and all that. It is a casual conversation discussing how they perform their duties.

THE COURT: And you conduct the conversation?

THE WITNESS: Normally, yes. If they answer directly to me, which Ms. Lynch did.

Q. Mrs. Harris?

A. She was always Ms. Lynch when she worked for me. Mrs. Harris.

[p. 123] Basically the criteria is how well they follow directions, how well they communicate with the rest of the staff and how well they conduct intermingle their department with the other departments and how well they operate with the other managers and get along with basic people in general and whether or not they operate their department in a professional and profitable manner. And those were basically the three criteria that we used.

Q. You heard me, and of course you and I read this tape, the transcript of the tape. She said that you didn't give her review and you said you did give her review?

A. That's correct.

Q. Could the difference of opinion be in what she felt a review should be?

A. I certainly feel that's what it was, and I told her that several times.

Q. What did you tell her?

A. I told her I just felt like that she got a review and I told her the dates that we went over, and she didn't agree with that. So I didn't want to sit and argue so I said whatever, but I think it is a misinterpretation what she felt like was a review and what wasn't.

Q. What had it been like prior to that?

A. It's been the same way for 13 or 14 years so it hasn't changed.

[p. 124] Q. Do you still do it the same way, a casual conversation you discuss it?

A. Right.

Q. During the meeting, that two-and-a-half-hour meeting that this transcript came from, did you try to explain to her about her job and what she had to look forward to and how the business was working on rental stuff?

A. I'm sorry, I missed you there, Stan.

Q. Did you during that two-and-a-half-hour meeting discuss with her about what was going on with rentals - I mean, she was the rental manager - and what had to be done to make money and whether her load was too heavy, et cetera, discuss general business?

A. Are you talking about when she taped the conversation?

Q. Yes.

A. Yes.

Q. And the transcript reflects that. I mean, I didn't go over everything in it, but it reflected that?

A. Yes.

Q. How did you find out, by the way, that she had taped the conversation?

A. She called an employee of our company and was boasting about it, and he came and told me.

[p. 125] Q. Is there anything else to tell the Court in regard to this review business?

A. Not that I can recall. The only point I wanted to make was the fact that any time you bring an employee in and you start discussing compensation, I mean that is a form of review. Whether or not she interpreted it to be that -

Q. Well, obviously she did not.

A. Right. But, I mean, we didn't talk about their income, her income in particular on a daily basis. It was discussed - I can't remember exactly. Have to look it up - in May or June, whenever it was. We do that every year about the same time. It is not always - for instance, this year we didn't get to do it until early July. So I mean it is not etched in concrete. That's when we try to do it and when the employees are notified to look forward to review during those months.

Q. I believe in the tape you made a point to her that you treat everyone the same?

A. Treat everybody equally.

Q. Was the workplace a place where a lot of joking went on?

A. We tried to keep it light mannered, enjoyable place to work.

Q. And I think that's reflected in the transcript [p. 126] too. Now, did you feel when you were making jokes as these two witnesses said they received that they put on, was it your intention to make Teresa Harris uncomfortable?

A. No, not at all.

Q. Was Teresa Harris a friend of yours?

A. A very close friend of mine.

Q. And did you and your wife go out with Teresa Harris and her husband?

A. Yes, we have socialized I think she mentioned one occasion. I can't give you the number.

Q. And you liked Teresa Harris?

A. Thought - I had a very high opinion of Ms. Lynch.

Q. On these things that you have heard about about [sic] throwing coins down or the joke about corn making breasts grow and things about get a quarter out of my pocket, these things were recognized - I will ask you the question. Were these things recognized generally in the office as jokes?

A. First of all, I was asked those questions when all this came up and I didn't remember them because it was a joke and everybody was - we had a pretty loose group that liked to joke around. I don't mean that in a derogatory manner when I say loose. Everybody liked to have fun. We worked hard, we played hard, and everything [p. 127] was construed as a joke. It was never intended nor was it ever indicated to me it was taken any other way.

Q. You heard her explain about the corn business?

A. Yes.

Q. With Terri Curtis. That was Terri Curtis that did that?

A. Yes.

Q. And you heard me ask her about J. R. Greg about this quarter business?

A. Yes.

Q. Is Greg the one that -- was he the one that had the episode happen to him?

A. With a guy named Jansen Meredith.

Q. Who had said something to him about getting a quarter out of his pocket?

A. Yes.

Q. And that was nothing in the office?

A. No.

Q. That man wasn't employed after you heard him making the jokes, I assume?

A. No.

Q. And you heard her say that you had management meetings at the Holiday Inn many times?

A. Yes, we did.

Q. And on the tape I think you covered that on the [p. 128] transcript with her too.

Now let me ask you this. You helped Larry Harris, Teresa Harris's husband, start a business called Cellular Power?

A. That's correct.

Q. You provided the financial wherewithal?

A. One hundred percent.

Q. And had Larry Harris taken [the sic] option of take[ing sic] it over and run[ing sic] it?

A. We had the option where Teresa Harris could earn it over a five-year period going in had that understanding.

Q. They could earn their own business, you get whatever it is back and they would grow?

A. Right.

Q. Growing out of that transaction there was a note owed to you, wasn't there?

A. That is correct.

Q. Did in fact Larry Harris and his company, Cellular Power, make payments to you each and every month that it was due?

A. That is correct.

Q. And did they make those payments each and every month that they were due for a long period of time?

A. Through September of '87.

[p. 129] Q. And it was in September of '87 that all of this happened with Teresa Harris and Forklift Systems?

A. That's correct.

Q. And when Teresa Harris and Forklift Systems happened, did the payments on the note stop?

A. Immediately.

Q. Okay. And you had to institute suit for the collection?

A. That is correct.

Q. And you now have your money?

A. Yes, sir, I do.

Q. All right. Did the problem with Teresa Harris at Forklift Systems as you understand it mirror the same time that you started having difficulty with Mr. Harris running Cellular Power?

A. I believe it did, yes, sir.

Q. And it was that you didn't think that Larry Harris was running the business the way it should be run?

A. That is correct.

Q. You had your money in it?

A. Yes, sir.

Q. And you have gave [had given sic] him some alternatives; is that correct?

A. Yes, sir.

Q. And did you also because of those things [p. 130] happening business-wise with Cellular cause Forklift Systems to discontinue having business with them?

A. I told Larry in September that we would not continue doing business with them.

Q. You told Larry Harris that?

A. Yes, I did.

Q. Did you have any conversation with Teresa Harris about that?

A. I am sure I did. I can't swear that I did, but I am sure I did.

Q. When do you think Teresa Harris found out about Forklift Systems stopping doing business with her husband's company?

A. Well, it was all so closely related because - excuse me just a minute, Your Honor. Let's see. September something.

Q. Well, just approximately.

A. Well, I was just going to give you the chronological order here. On September 29, which was a Tuesday, had a meeting with Larry Harris at 3:00 p.m. and notified him because of our differences we would be terminating our business, and then on October first she left, which was Thursday.

Q. So would it be safe to say that within a very, very short timeframe all of these things happened at once?

[p. 131] A. Yes, I think that would be correct.

Q. What was your reaction when you discovered from a fellow employee that your conversation had been taped?

A. I was just astonished that she would do that.

Q. Why were you so astonished?

A. We had been very close the whole time Teresa had been there we had a very close relationship. We had -

I mean we were just very, very good friends and we were close, and I just didn't think that she would do something in my opinion under-handed like that. I was just astonished that she would do it.

Q. Was it a fact that Teresa Harris - and she said she did, but was she treated like one of the boys by the rest of the fellows?

A. Yeah, she always was. That's what she always wanted to be.

Q. In fact she took a trip once to Memphis in a van with just men?

A. That's correct.

Q. Up until all of this stuff came to your attention with her telling you all these things, did you know that she wasn't happy being one of the boys?

A. No, she never told me that.

Q. Did you know that she may not have been happy making the money that she was making?

A. I think she was happy with the money she was making. Didn't indicate to me she wasn't.

Q. What is the review thing talking about money?

A. Well, the review thing basically we review once a year and I just wanted to let her know and went something of the nature of the plan is going to be the same next year. Went through this with Dick Reed. There will be no increases in salary. There will be no increases in the compensation plan in any form unless we some time this

year - and I told her that Bennie and I would sit down and look at the numbers.

Q. Bennie Lawson?

A. Bennie Lawson. And we'd look at the numbers and that we were obviously probably going to have to change the commission plan from the standpoint of the company incurred some 250-300,000 dollars worth of additional indebtedness from forklifts, and yet she was still being paid under the old plan.

Q. That is also in the transcript, is it not?

A. I believe it is, yes, sir.

MR. CHERNAU: You can ask.

CROSS EXAMINATION

BY MR. VENICK:

Q. Mr. Hardy, as I understand your testimony, you testified on direct that you conducted a review of Mrs. [p. 133] Harris on June first of 1987; is that right?

A. Approximately that time, yes, sir.

Q. Well, in fact didn't you have a notation in her personnel file dated June first, '87?

A. I have got her personnel file over there. I am sure I did.

Q. Let me hand you this document.

A. Okay, is that a copy of the note that you placed in Mrs. Harris's personnel file reflecting her review on June first, '87?

A. I am sure it is, yes, sir. It is my handwriting.

MR. VENICK: Move that into evidence, Your Honor, as the next exhibit.

THE COURT: Without objection, part of the record.

(June 1, 1987, review was marked Exhibit 5.)

Q. And that document was written on June first, '87, wasn't it?

A. Yes, sir.

Q. Now, that document basically doesn't contain any complaints about Mrs. Harris's job performance except having to make too many - that she made too many personal phone calls and had to improve her billing time; is that right?

[p. 134] A. That's correct.

Q. That's the only thing you state in there about her job performance?

A. Right.

Q. And I believe your testimony in your deposition was that in fact you had made notations in your personal desk calendar about the reviews of all the managers in 1987; is that right?

A. I normally make a notation as to when we do it, yes.

Q. And in your desk calendar you also had made a notation on Tuesday, August 18, 1987, about a reprimand you had given to Mrs. Harris; isn't that right?

A. Yes.

Q. Let me hand you these documents, Mr. Hardy, and ask you if in fact those are not copies of documents of those pages from your calendar?

A. I feel certain they are, yes.

THE COURT: He says yes.

MR. VENICK: And if we can move that as the next exhibit, Your Honor.

THE COURT: Without objection.

(Calendar pages were marked Exhibit 6.)

Q. Now, with respect to Exhibit Number 6, Mr. Hardy, just out of curiosity you had a notation down here [p. 135] that on May 25 you reviewed Mike Moseley and David Matthews; is that right?

A. Let me look. That's correct.

Q. Were you open on Memorial Day that year?

A. Pardon me?

Q. Were you open on Memorial Day that year?

A. I don't know.

Q. Well, the calendar says "Memorial Day observed", doesn't it?

A. It just got on the wrong page, I'm sure.

Q. Well, I mean didn't you write these down on the day these things occurred?

A. May or may not have.

Q. Oh, so these things may not be accurate? Is that what you are saying?

A. I didn't say that they were accurate or were not accurate. You asked did I write them down on that particular day. I may or may not have.

Q. Did the review occur on May 25?

A. I made a notation probably on something else and put it in there. It is not unusual to do that.

Q. My question was did the review occur on May 25?

A. If that's Memorial Day it did not, no, sir. We are closed Memorial Day.

Q. What about the next one, Dick Reed, May 26, [p. 136] [did sic] the review occur on that [day sic]?

A. I am sure they all occurred that week. What I did, I just took Monday when I went back. You can look at the writing and you can see they were all made on the same day.

Q. When you went back, Mr. Hardy? What do you mean when you went back?

A. Well, when I went back and made the notation.

Q. Don't you schedule things in advance and write them in advance rather than going back?

A. Not necessarily.

Q. You go back and take care of it that way, Mr. Hardy?

A. I keep note pads and things if I didn't have something on me. I might not have had this with me when that was done.

Q. You keep that on your desk every day, don't you?

A. No, sir. Sometimes it is in my car, and I have got more than one car. Could have been in my car.

Q. Let me see if I understand your testimony about those notations on that desk calendar. Are you saying then that those were more than likely not made on the days indicated?

A. Obviously if it was Memorial Day probably what [p. 137] happened was you can see May 25, 26 and 27 what I probably did was did reviews, made my notes and at some later date went back and put them in.

Q. You didn't answer my question.

A. I'm sorry, I didn't understand.

Q. I thought it was pretty clear, Mr. Hardy. I asked if you made the notations on the calendar on the date indicated.

A. No, sir.

Q. You made them some other time?

A. Yes, sir.

Q. Would you have made them all at the same time?

A. I would assume, yeah. It looks as if they were made by the same pen. I would say yes.

Q. In addition there is also included in Exhibit Number 6 an entry for date of August 18, 1987; is that right?

A. Yes, sir, I have got that.

Q. And below that is a reference to a conversation that you allegedly had with Mrs. Harris that day?

A. That's correct.

Q. Now, starting with the words "meeting with Teresa Lynch 3:00 p.m."?

A. Right.

Q. Was that note written on August 18, '87?

[p. 138] A. Somewhere thereabouts I am sure, yes. That one there the meeting with Teresa Lynch at 3:00 p.m. I am sure was written before August 18 because I probably had that set up. You can see that the ink is different. And then I went back and entered in what we had talked about.

Q. So the part that says "receptionist quit", that was probably written August 18?

A. Could have been August 18 or 19. I didn't necessarily always put it in the same day.

Q. So that day or the next day?

A. Right. I would think so.

Q. And in the personnel file for Mrs. Harris you also made another notation of that conversation with Mrs. Harris on August 18, did you not?

A. Is that the one you gave me earlier?

Q. No, it is the one I am giving you right now. Okay, is that from Mrs. Harris's personnel file?

A. Yes, it is.

Q. And that basically mirrors the entry in your calendar on August 18, '87; is that right?

A. Pretty close.

Q. Was this document written on August 18, '87?

A. I would say close to it, yes, sir.

Q. Well, Mr. Hardy, in your deposition I had asked [p. 139] you whether or not you ever pre-dated or post dated any documents that were in personnel files and you said no.

A. Well, I don't. I mean, I might go back and put something in the personnel file. That might not have went in until the next month.

Q. You are saying this may have gone in sometime a month after it occurred?

A. May have.

Q. No more than that?

A. I can't tell you that. We are talking three years ago. I am telling you what my practice is: is [sic] that I will make notations on whatever I have got available at the time. I don't carry this thing with me all the time. It is not always on my desk.

Q. When I had asked you whether or not you pre-dated or post dated memorandum, you said no.

A. No, I do not.

Q. You don't consider writing this a month later and putting in dating August 18 as post dating a memorandum?

A. I don't know that I did, but I can't say that. You are asking me to emphatically tell you if that was written on August 18. It is dated August 18. If you want me to say that I wrote it August 18, then I will say I wrote it August 18.

[p. 140] Q. Is that your testimony?

A. I cannot swear to that, no, sir.

MR. VENICK: Like to move that into evidence as the next exhibit, Your Honor.

THE COURT: Any objection?

MR. CHERNAU: No, Your Honor

THE COURT: Part of the record.

(August 18, 1987, memo was marked Exhibit 7.)

Q. You were also asked to bring the personnel file of Kathy Kernell, and from that there is a document dated November 23, '88. Is that from Ms. Kernell's file dated that day?

A. I am sure. Yes.

MR. VENICK: Like to move that into evidence as the next exhibit, Your Honor.

THE COURT: All right. This one was number 7. Now this one is number 8.

(Kathy Kernell file document was marked Exhibit 8.)

MR. VENICK: Can I consult with you on the number of our exhibits? Thank you, Your Honor.

THE COURT: Mr. Venick, this is that statement from Vanns.

MR. VENICK: Right. That's not an exhibit, Your Honor.

[p. 141] THE COURT: You may take it back then.

MR. VENICK: Thank you.

BY MR. VENICK:

Q. Mr. Hardy, with respect to your desk calendar entry of August 18, 1987, you make a reference down there about receptionist quit?

A. Yes, sir.

Q. Now, wasn't your testimony in the deposition that we took in my office - in Mr. Chernau's office that in fact you claimed that Mrs. Harris caused two receptionists to quit because of her language?

A. Yes.

Q. And those two receptionists were Angela Hicks and Kim Hampton?

A. I believe that's correct.

Q. Just so I can be real clear now, they quit because of Mrs. Harris's language?

A. They quit because of Mrs. Harris and her language, that's correct. That's what they told me.

Q. And they quit?

A. That's what they told me.

Q. Now, I believe you also testified in your deposition that you were intending to terminate Mrs. Harris some time and that is that you had a meeting with Dick Reed in September '87 to fire Mrs. Harris. Isn't that right?

[p. 142] A. When did I testify to that?

Q. Well, you testified to that on Tuesday, November 21, 1989, page 37 of your deposition. Want me to read your testimony to you?

A. Yeah, would you? That is correct, but I didn't think that I testified to that.

Q. This is beginning on line 22:

"A. I had every intention of firing her.

"Q. When?

"A. Dick Reed and I had a meeting. We were going to terminate Ms. Lynch on October 7. She just kind of beat us to the punch.

"Q. When did you and Mr. Reed have a meeting?

"A. It was the end of September when we terminated the business with Larry so I would say it was around the 29th."

Q. Is that your testimony?

A. That is correct.

Q. You were going to fire Mrs. Harris pursuant to a meeting you had with Mr. Reed sometime prior to the meeting you had with Mr. - allegedly had with Mr. Harris; is that right? Do you follow me?

A. I'm -

Q. What I am trying to say is you had a meeting with Dick Reed where you had decided you were going to terminate Mrs. Harris, and that was before the meeting you testified on your direct examination that you had with Mr. Harris and told him you were terminating the business relationship?

[p. 143] A. We had the meeting with Larry on the 29th of September. Now, what are you asking?

Q. And this meeting with Mr. Reed to fire Mrs. Harris occurred prior to that?

A. No. Well, it could have been, but I'd say it was probably after that. I mean, I don't really - it is three years ago. I can't remember.

Q. Deposition -

A. It would have been somewhere in that time.

Q. There is no question in your mind though that you had a meeting with Mr. Reed where you discussed firing Mrs. Harris?

A. Yes, I did.

Q. And with respect to the business relationship with Mr. Harris's Cellular Power Systems, I believe you were requested to produce documents that substantiated

some of the concerns you had about Mr. Harris's business, and there weren't any documents; isn't that right?

A. No, there were not any documents that I can recall other than just conversations between customers and salesmen and suppliers.

Q. And it is your testimony that you in fact terminated the business relationship with Cellular Power on September 29, 1987?

A. That is correct. He was personally notified by [p. 144] myself.

Q. Hand you a copy of this document. That's a copy of the letter that Stephanie Vanns wrote on October 7, 1987, to Cellular Power, is it not?

A. That's correct.

Q. And that's her signature as you recall?

A. That's not my signature.

Q. I said it's her signature?

A. Yes, as far as I know.

Q. And the date of it is October 7, '87?

A. That is correct.

Q. And the document says that pursuant to a conversation that she had with him, all existing purchase orders were going to be cancelled?

A. That is correct.

MR. VENICK: Like to move that into evidence as the next exhibit, Your Honor.

THE COURT: Without objection. That's number 10.

(October 7, 1987, letter from Vanns was marked Exhibit 10.)

Q. Now, with respect to the meeting that you and Mrs. Harris had when she kept that tape?

A. Yes.

Q. You did apologize to her for what you said to [p. 145] her. Isn't that the case?

A. I told her if I offended her for anything, I apologized because she never indicated to me that I offended her.

Q. Well, specifically on page 7 you said-

A. I need a copy.

MR. CHERNAU: May I hand this to him?

THE COURT: Yes.

MR. CHERNAU: I have written all over it so you have to watch for it.

A. Page 7?

Q. Page 7.

A. Yes, sir.

Q. You say there in the third full paragraph:

"Well, you know, let me just say this. I apologize for all the times I said the things you took wrong. Had I known that it bothered you that much, I wouldn't have said it, but I think you

would be foolish to throw out what you have got here on a whim. You got pissed off."

Is that what you said?

A. I believe that's correct, yes, sir.

Q. And is that an apology?

A. That's what it says. Says "I apologize."

Q. You take that as an apology, don't you?

A. I would assume that. I said, "I apologize."

Q. Didn't you testify in your deposition that you [p. 146] never made any apology to Mrs. Harris?

MR. CHERNAU: What page?

MR. VENICK: I am asking first if that's what he said in the deposition.

A. I don't know. Read - I don't understand what you are talking about. If I testified I didn't, I guess I testified I didn't.

MR. VENICK: Your Honor, can we take a brief recess so Mrs. Harris can go to the restroom?

THE COURT: Yes. Ten minutes.

(A short recess was taken.)

THE COURT: You may go ahead.

BY MR. VENICK:

Q. Mr. Hardy, before we broke actually I was asking you whether or not you had in fact apologized for the things that Mrs. Harris had took offense to, and I think

your testimony was you had apologized and that's what your testimony was in your deposition?

A. That I did apologize.

Q. That you did?

A. Yeah, that's fine.

Q. My real question though after you apologized you then promised her you wouldn't do it any more?

A. Go on.

Q. My question to you is after you told her that [p. 147] you apologized for whatever it was she took offense to, did you promise to her you wouldn't do it any more?

A. I think that's correct, yes.

Q. Well, now, at your deposition on Tuesday, November 21, '89, I asked you that exact question, Mr. Hardy. I asked you this.

MR. CHERNAU: What page?

MR. VENICK: Ninety and 91.

Q. Did you say to her, you know, Q. "whatever it is you are complaining about, I promise to stop it"?

"A. No, sir."

Well, did you promise to stop it or not promise to stop it, Mr. Hardy?

A. It is obvious right here that I said I apologize for all the things I said you took the wrong way.

Q. Were you telling the truth in Mr. Chernau's office or telling the truth today about promising not to do it?

A. I always tell the truth.

Q. You were sworn under oath, weren't you, Mr. Hardy?

A. I could have misunderstood your testimony. I apologize.

Q. So in fact you did promise you wouldn't do it any more?

[p. 148] A. Yes, sir, it is pretty obvious from this that I did.

Q. Now let me go back a little bit so I am clear on what happened with Cellular Power Systems and Forklift Systems. Now, as I understand your testimony you had some problems with what Cellular Power Systems was doing, how they were providing service to you; is that right?

A. Yes. This - right. What year was this is what I am asking.

Q. I think you testified that you terminated the business relationship September 29, '87?

A. Right, that's correct.

Q. So prior to that time I assume you must have had some reasons for terminating the business relationship?

A. That's correct. We actually discovered it late - well, probably early '87 when we discovered the discrepancy.

Q. Discovered what?

A. That we were being price gouged.

Q. Oh, price gouged. You discovered that in early 1987?

A. I'd say the spring of '87 is when we first confronted Larry.

Q. Why else did you terminate the business relationship besides the price gouging you discovered in [p. 149] the spring of 1987?

A. Poor service.

Q. Poor service?

A. Poor response time. Complaints from customers. Complaints from salesmen.

Q. And you discussed these complaints in meetings with your managers, did you not?

A. No, I discussed them with Larry Harris.

Q. You never discussed them with your managers?

A. Oh, I am sure there were some discussions, yes. I can't give you a specific date that we did, no.

Q. Well, you had managers meetings, didn't you?

A. That wasn't discussed at managers meetings.

Q. You never discussed it at managers meetings?

A. I can't tell you. As far as I know, I don't think something like that would be discussed. If we were having trouble with a particular supplier, unless a manager brings it up or something, it is not discussed.

Q. So you had problems with price gouging that you discovered in spring of '87?

A. You are asking me for specifics. We had so many reasons. That's just a few I remember.

Q. In your deposition you named four.

A. That was four I remembered.

Q. They were price gouging. They were poor [p. 150] service. They were something about him hiring some former employee of Forklift Systems?

A. That's correct.

Q. And some questionable billing?

A. That is correct.

Q. Those are the four reasons?

A. Yes, sir.

Q. You have been involved in a lot of litigation with Cellular Power so I would imagine by this time this stuff would be at the tip of your tongue, Mr. Hardy.

A. Well, I appreciate your having so much confidence in me, Mr. Venick.

Q. I don't have a whole lot of confidence in you Mr. Hardy.

MR. CHERNAU: I don't think that's appropriate.

THE COURT: Let's don't have any jousting. Feudal days are over.

MR. VENICK: Yes, Your Honor.

Q. So you are saying you didn't talk about the problems with Cellular Power in your manager meeting?

A. Mr. Venick, I am not saying that we didn't, no, sir. I can't tell you that we did. I just don't ever remember having a conversation about it in a managers meeting.

Q. Your best recollection is you didn't have a [p. 151] managers meeting?

A. That is correct. Whatever department we were having the trouble with, that's who we would have talked to about it.

Q. But you would have talked to certain other managers in your employ?

A. I am sure, yes.

Q. Would have talked to Dick Reed about it?

A. Dick Reed, Mike Moseley.

Q. Bennie Lawson?

A. Just whatever - no. Well, we might have talked to Bennie about it, right. Could have.

Q. Teresa Harris?

A. We might have talked to Teresa about it. I am not sure. We talked to Larry.

Q. I am talking about you.

A. I can't swear that I did or didn't. I mean, I just - I just don't know. I don't recall the conversation about that.

Q. But your testimony is that you did speak in addition to certain employees of Forklift Systems you talked to Larry Harris about these problems?

A. I sure did.

Q. And particularly what problems did you talk to him about?

[p. 152] A. Well, the pricing.

Q. When did you talk to him about the pricing?

A. Some time prior to October of '87.

Q. No idea when that might have been?

A. No, sir.

Q. What else?

A. I mean just the general things that we told you we were having problems with. Just all the various problems were getting we are paying the price of a new battery and getting an old battery. I mean, the way we discovered it was when we opened the branch in Louisville, Kentucky, in late '86, '87 we started selling a few products up there. We discovered that they were buying the same batteries at five percent cheaper than we were buying batteries, and of course his comment was, "Well, they are larger and they are buying larger quantities." And he always had some excuse, but everything kept going the same and we kept complaining until we terminated everything.

Q. Did you tell Mr. Harris that this stuff was bothering you so much that you might have to terminate the business relationship?

A. I don't know that I told him it was bothering me that much. We told him if it continued we would terminate it, yes, sir.

Q. You told him that on a number of occasions [p. 153] prior to September 29, 1987.

A. More than once. I don't know how many occasions.

Q. That's the basis of your allegation Mrs. Harris should have known about that; is that correct?

A. I would assume she would.

Q. Well, it is the basis of your allegation because you already testified that you probably didn't talk to her about it?

A. Well, I didn't say that I - I can't recall. You asked me did I talk to her. I cannot recall a conversation I had with her. I'm sorry.

Q. So, fine, your best recollection is you didn't talk to her about it?

A. That's correct.

Q. So the only other person she could have heard about it from was Larry Harris?

A. That would be -

Q. So your testimony is that you told Larry Harris -

THE COURT: That's not necessarily so. Larry could have told somebody else who told his wife. Go ahead.

Q. But it would have gone through Larry Harris?

MR. CHERNAU: Well, it could have gone through another employee of Forklift. I wasn't going to interrupt [p. 154] this, but this is sort of silly.

THE COURT: Watch the questions, Mr. Hardy. Listen to the questions carefully.

BY MR. VENICK:

Q. Now, do you recall the deposition that Mr. Wilson took in the case of Hardy versus Harris on June 15, 1988? He took your deposition in that case, didn't he?

Yes, I remember that.

Q. According to the deposition it was June 15, '88. During that deposition Mr. Wilson asked you whether or not you had regular meetings to evaluate the quality of service and the products that was being received by, for example, Cellular Power. You said, "Yes we, do." You just testified a few minutes ago you didn't.

A. No, I didn't. You asked me did we do that in managers meetings. That's not what that says.

Q. So what did you take that question to mean, Mr. Hardy?

A. Read it again. It is self explanatory.

Q. "And do you have regular meetings, for example, to evaluate the quality of the service and products that is being received by, for example, Cellular Power Systems and its predecessor?"

A. And I said yes.

Q. And you said, "Yes, we do."

A. Yes. But that could be a meeting with a [p. 155] particular manager. Wouldn't necessarily be at a managers meeting.

Q. I see. Okay. And you also testified earlier that you cancelled the orders and terminated the business relationship with Mr. Harris in person; is that right?

A. That is correct. He was sitting right across from my desk.

Q. Let me refer you back to the deposition you took. This is the series of questions and answers that were given.

MR. CHERNAU: Which case are we in?

MR. VENICK: This is Hardy versus Harris.

Q. "Q. Can you tell us on what factual basis orders were cancelled with Cellular Power Systems after Teresa Harris left the employ of Forklift Systems?"

"A. They were cancelled prior to her leaving.

"Q. Are you saying then that there were none ever cancelled after her leaving?"

"A. No.

"Q. You are not saying that?"

"A. I am saying we cancelled over the phone. Now, he may have received written confirmation after she left, but they were cancelled prior to her leaving."

A. That's correct. The way the thing actually happened was Larry Harris and I had a meeting and I told

him that I was going to cancel it. And part of it involved Carl Myers who had stolen money from us. I told him if he hired Carl Myers, we couldn't tolerate doing any more business with him based on everything else, all the other [p. 156] problems we had.

He went ahead and hired Carl Myers, and I called him on the phone and told him we were going ahead with our plans. And that's when we set up the meetings with the battery people and precipitated Teresa leaving.

Q. You testified earlier about the basis upon which you evaluate employees?

A. Uh-huh.

Q. Remember that testimony?

A. Yes.

Q. One of the things you talked about was basing your evaluation on profitability; isn't that right?

A. That's correct. That's a big thing.

Q. In the course of discovery in this case you had prepared this document, did you not?

A. I believe that's correct.

Q. That's your handwriting, isn't it?

A. Yes. But you have already told me this is not correct in a meeting at Stan's office.

Q. I am asking if that's your handwriting.

A. Yes, it is my handwriting.

Q. And in the course of that document you make some references to raises that were given and point out at the bottom that the rental department showed a loss?

A. No, I didn't say it showed a loss, no.

[p. 157] Q. Or it had reduced profits; is that correct?

A. That's correct.

MR. VENICK: Let's move this into evidence as the next exhibit, Your Honor.

THE COURT: Without objection. Part of the record.

(Handwritten chart was marked Exhibit 12.)

Q. And what you show on this document is that the parts manager received a five percent increase in salary at the very top; isn't that right?

A. Yes.

Q. And you show based upon the '87 and '86 figures an increase in net profit or actually it's gross profit of approximately 14,000 dollars; is that right?

A. Yes.

Q. And service manager received five percent increase; isn't that right?

A. That's correct.

Q. And your figures from '86 to '87 show an increase in profit of approximately 44,000 dollars?

A. Right.

Q. And then you have the figure for the rental manager?

A. Right.

Q. Now, these figures, if I am not mistaken, are [p. 158] based upon Forklift Leasing; isn't that right?

A. Probably, yes. Yeah, I think that's correct.

Q. And at the very top you have, "Evaluation in question May '87 covers performance from 3-1-86 through 2-21-87"; is that right?

A. Wait a minute. That was what -- all that refers to is that was what you were asking for. That doesn't mean this is what I used for exact evaluation.

Q. This was part of evaluation, wasn't it?

A. This was part of it.

Q. Because you show some increase here?

A. I don't want you to misinterpret that. This was done for your benefit.

Q. I appreciate that, Mr. Hardy.

A. You are welcome.

Q. Now, the rental manager's cost and sales are reflected in the profit and loss statement, financial statements of Forklift Leasing Corporation; isn't that correct?

A. That's correct.

Q. There is also a revenue and cost included in profit and loss statements and financial statements of Forklift Systems; isn't that right?

A. That is correct.

Q. And these figures at the bottom don't include [p. 159] the Forklift Systems figures, do they?

A. No, they do not.

MR. VENICK: Your Honor, at this point I want to -- I have asked Mr. Hardy to bring the financial statements of Forklift Leasing and Forklift Systems. I have made a chart of those. Those are under a protective order. I'm happy to deal with them any way the Court wants to deal with them.

THE COURT: Just go forward with your proofs. I think a protective order doesn't cover matters in court. But I think it also states that people can't take anything out of court.

MR. VENICK: Yes, Your Honor.

Q. Now, Mr. Hardy, I have taken the benefit of going through the financial statements you were ordered to bring to court this morning for Forklift Systems and Forklift Leasing?

A. Okay.

Q. I believe in your deposition you said what you looked at was gross profit, and that's what these figures show?

A. Correct.

Q. And we have a column here for 1985 and 1986 and 1987?

A. Uh-huh.

[p. 160] Q. And you can go check your documents there and make sure they are accurate.

A. No, I will take your word for it.

Q. Here we have parts sales, parts profit. We show 1987 gross profit for parts went up ten percent?

A. Okay.

Q. We have service went up seventeen percent?

A. Uh-huh.

Q. Now, we have rental from Systems?

A. Uh-huh.

Q. Went down from one ninety-nine to one seventy-nine. And that's what you had written on here.

A. I thought you had you said that was from -

Q. I'm sorry, this should be for Leasing. I got it wrong. I'm sorry. Should be for Leasing.

A. Is it reverse now?

Q. It is reverse. I'm sorry. Now for Systems we come up with this figure over here.

A. Uh-huh.

Q. You add those up, gross profit for rental attributable to Teresa Harris went up 40 percent from 1986 to 1987.

A. No, that's not true.

Q. Well, Mr. Hardy, those are the figures from your financial statements.

[p. 161] A. That's correct. I agree with that.

Q. In addition we show that net profit before taxes, okay, went from -

A. Is this combined or

Q. No, no, this is for Systems.

A. Okay.

Q. Went down from 101.4 to eighty-eight five twenty-eight, and net after taxes went up. Yet Mrs. Harris wasn't entitled to a bonus of 3,000 dollars whereas Ms. Kernell, Mr. Lawson, Mr. Moseley all got bonuses of 4,000 dollars or more?

A. That's correct.

Q. And your justification for that is her poor job performance?

A. I didn't say that. Are you saying that?

Q. No, I am asking you for your justification.

A. No. First of all, what you don't know and what these figures don't reflect is that we had about 120,000 dollars worth of rentals that went to Louisville, Kentucky. Now if you deduct that out of that, the reason I didn't use the Systems figure is she didn't get paid on the rentals that went to Louisville, Kentucky. So instead of trying to the break it all out for you - which you don't understand business; didn't expect you to - I didn't use those figures.

[p. 162] One of the big things that you made a big to-do over early on and Mr. Wilson had a large deal over was there was a note in her personnel file "do not pay

Teresa Lynch on Louisville rentals". The reason was it was done at a cost figure. That's not reflected in there.

Also she couldn't have increased her billings unless Forklift Systems bought the product. So we assumed the indebtedness.

Now, the bonus - if I may, the bonuses are a gift from Forklift Systems. Everybody in the company receives a bonus except me, and they are based on longevity in a large part.

You go back and look through, David Matthews was a male manager who had less tenure than Ms. Lynch, and he got 1800 dollars, but you don't mention that. She got \$3,000 because she had been there longer and because the company had a good profitable thing.

Ms. Lynch also and Mr. Matthews were both on a commission plan at the time and could alter their income. Mike Moseley, Kathy Kernell and Bennie Lawson had no opportunity to enhance their position one iota.

And plus they had been there ten years. I think a person that's been there ten years deserves a bonus more than a person that's been there two. And if I erred in my judgment, I erred in my judgment.

[p. 163] Q. Would you agree a person who's on commission bears more of a risk of their income than a person who's on salary?

A. I - not in her particular case no, sir.

Q. I asked you if you would not agree with that statement?

A. No, sir. Not in her particular case, and we were talking about her particular case.

Q. Mrs. Harris filed her EEOC charge October 5, 1987; isn't that right?

A. I believe that's correct.

Q. And you received that in your office some time during the month of October, did you not?

A. It was late October, yeah, 28th, 30th, something like that. I can't remember when it was.

Q. And it was your understanding that Cellular Power was - sorry, Forklift Systems was the principal customer of Cellular Power?

A. Yes, I think that would be.

Q. So you really had no expectation after you terminated the business relationship that you would get paid on your note, did you?

A. I wasn't getting paid. I mean, he had paid me September, and when we terminated it I knew see, that was what precipitated the meeting with Dick and I was that [p. 164] we knew once we terminated our relationship with Larry that Teresa wouldn't stay.

Q. Well, you also knew that Cellular Power wasn't going to be able to pay its note?

A. I didn't know that.

Q. You didn't know that?

A. No, sir.

Q. Had no idea of that?

A. No, sir. I had not seen any financial information on that company in over a year.

Q. And you filed your lawsuit against Mr. Harris in December of '87; isn't that right?

THE WITNESS: Is that when it was, Stan?

MR. CHERNAU: I don't remember.

A. I think so.

Q. Copy of the complaint prepared by your attorney then, Mr. Edwards. Date on the file document there, Mr. Hardy, at the very top -

MR. CHERNAU: This is Cellular Power filed by Mr. Edwards?

A. December 4, 1987.

MR. CHERNAU: May I see this that a moment? I don't understand what that is.

Oh, okay.

THE COURT: Part of the record.

[p. 165] (Hardy vs. Harris complaint was marked Exhibit 14.)

Q. And of course the filing of that lawsuit had nothing to do with Mrs. Harris filing that EEOC complaint, did it?

A. Nothing whatsoever.

Q. Nothing whatsoever.

MR. VENICK: One minute, Your Honor. I have nothing further, Your Honor.

MR. CHERNAU: May it please the Court, what can we do with that sheet since that's got those figures on it? I don't know what to do.

THE COURT: You can cover it back up.

MR. CHERNAU: You mean for the time being?

THE COURT: Do you want to ask any questions about it?

MR. CHERNAU: When we leave here, what should we do with it?

THE COURT: It is in the Court's possession.

MR. CHERNAU: Can he make an exhibit of that?

THE COURT: Sure he can.

MR. CHERNAU: No, did he? You may want to number it and let's fold it up. I have no questions; if the Court has any questions.

THE COURT: No, I have none. It will be taken [p. 166] down and numbered 15.

(Chart was marked Exhibit 15.)

THE COURT: Next witness.

DAVID ROY MATTHEWS was called, and being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. CHERNAU:

THE COURT: State your full name.

THE WITNESS: David Roy Matthews.

Q. Mr. Matthews, where are you presently employed?

A. Parts and Equipment doing business as Yale Industrial Trucks of Middle Tennessee.

Q. Were you employed at Forklift Systems during the time that Teresa Harris was employed there?

A. Partially. Teresa was there before I started.

Q. And were you there the entire time she was there?

A. No, she was there before I started and then I was there after she left.

Q. Well, that's what I meant.

A. Yes, sir.

Q. And are you a friend of Teresa Harris?

A. I believe so, yes, sir.

Q. Are you also a friend of Charles Hardy?

A. Yes, sir.

[p. 167] Q. And you have discussed this lawsuit with me?

A. Yes, sir.

Q. You have discussed this lawsuit with Mr. Venick?

A. Yes, sir. That was the gentleman that called me Thursday?

Q. Yes.

A. Okay, yes, sir.

Q. And when the EEOC complaint was filed, - oh, you didn't give a statement in the EEOC statement?

A. No, sir.

Q. Let me ask you something, David. Describe to the Court if you would the situation out there at Forklift in regard to the type of environment it was. Was there a lot of joking going on?

A. Yes, sir.

Q. And would there be statements made by people, Charles Hardy or other people, that were recognized as jokes and laughed about?

A. Oh, yes, sir.

Q. All right. Did Teresa Harris conduct herself as one of the group or as I keep using the expression one of the boys?

A. One of the group, yes, sir.

Q. And did you participate sometimes after work [p. 168] with hanging around after work and drinking beer and telling jokes?

A. I would say 98 percent of the time, yes, sir.

Q. All right. And was Mrs. Harris there many times?

A. Yes, sir.

Q. All right. Did you ever – I am going to get to the termination of her employment, but did you during the course of the time that you were there feel that Charles Hardy treated everybody equally, male or female, or that he was hostile towards females and created a hostile female environment?

A. You are asking my opinion, right?

Q. That's why you are here.

A. Charles is an intense person.

Q. All right.

A. And in fact I think he treats everybody the same. At times that is intense.

Q. But the point is everybody is treated the same?

A. I felt so.

Q. It is your opinion that he treated everybody the same?

A. I believe so, yes, sir.

Q. All right. When Teresa Harris left the employment of Forklift Systems, were you there the day that [p. 169] she got her check and left?

A. I was there the day she left. I don't know remember if there were checks involved that day or not.

Q. Did she say anything to you before she left?

A. I believe that I was the last person she spoke to before she left.

Q. At the time that you spoke to her the last time you spoke to her before she walked out of the building, who was in Charles Hardy's office?

A. I don't know their name. I know who they are. It was a big blue pick-up truck from one of the battery companies. Now, I believe it was David Gary is the name of the man, but I am not sure of that.

Q. And was the man or that business, are they in competition with Cellular Power, Teresa Harris's husband's business?

A. They are also a battery company so they would be competition, yes.

Q. Did Teresa Harris make a comment to you before she left?

A. Yes, she did.

Q. What was the comment she made?

A. I was in the warehouse, as I call it, out back. And Teresa came through and she was visibly upset, and she told me that she just didn't have to take this. She [p. 170] couldn't take this any more.

Q. How did you interpret that? What did you interpret that to mean? Did you relate it to the man in Charles Hardy's office?

A. On my own I did.

Q. Well, that's I am talking about you.

A. Yes, sir.

Q. How did you – what was on your own how did you relate it to the man in Charles Hardy's office?

A. Well, I had seen the truck outside.

Q. All right.

A. And then I saw that Charles' door was closed or locked or whatever.

Q. All right.

A. And that was not normal.

Q. All right.

A. So I knew that something was going on in there. And I felt just based on what was going on at that moment that that was just not acceptable.

Q. To Teresa Harris?

A. That's right.

Q. The straw that broke the camel's back?

A. That's the way I remember it, yes.

MR. CHERNAU: You may ask.

[p. 171] CROSS EXAMINATION
BY MR. VENICK:

Q. Your recollection is not based upon anything that Mrs. Harris told you, is it?

A. Other than she couldn't take this any more.

Q. She just came to you and said, "I can't take this any more" and was crying if I recall correctly?

A. She was close to crying. She was shaking real bad. She was very upset.

Q. You just made the jump that it had something to do with those trucks; is that right?

A. That was my opinion, yes.

Q. Not based on anything she told you?

A. She did not say, "That blue truck is out there; I am not putting up with this" and leave, no.

Q. Now, you and Mrs. Harris weren't together in the office every day in the same place eight hours a day, were you?

A. Somewhat. We were in the same building, yes, sir.

Q. I understand that. But you were the parts manager; is that right?

A. That's correct.

Q. And if I recall the way Forklift Systems is laid out, parts department as you are facing is over to the [p. 172] right, isn't it?

A. It is a separate room is the way I always called it.

Q. Separate room and separate door?

A. Yes, sir.

Q. And Ms. Harris's office

A. Was in the other room.

Q. Was in the main room. So although you would be in the same building, you wouldn't necessarily occupy the same work space?

A. No, sir.

Q. So consequently, the things that Mr. Hardy may have done or may have said to her, you wouldn't necessarily have any knowledge about, would you?

A. This is true.

Q. Now, I believe you left Forklift Systems in November of '89; is that right?

A. December of '89, yes, sir.

Q. And is it not also true that in fact you had met with Mr. Chernau about this case prior to the time you left?

A. I don't know if - I don't. Probably. I know I have talked with Mr. Chernau several times in regards to many cases.

Q. I see. Okay. But you don't have any specific [p. 173] recollection of meeting with Mr. Chernau prior to the time you left Forklift Systems about this particular case?

A. To be honest, I am not that sure what this particular case is. I mean, I don't know.

Q. I understand.

A. This is the first time I have been to court that nobody said we are going about this or we are going about that.

Q. Now, isn't it true that Teresa Harris had in fact, talked to you prior to this event you described on October first, '87, about being very upset about the way Charles Hardy was treating her?

A. On occasions that is correct.

Q. And wasn't one of those occasions some time in July or August of '87, a couple of months before she left in fact?

A. As far as date, I don't know. As far as conversation, I agree.

Q. And during that conversation she basically complained about the things that Charles Hardy was saying to her and the way he was treating her?

A. She conveyed the impression that Charles was mistreating her.

Q. Okay. And in fact she told you that she was going to turn in her notice and resign in August, didn't [p. 174] she?

A. She did.

Q. I understand that you are going to be leaving your employment some time soon; is that right?

A. No. I wouldn't say that.

Q. No, don't think so?

A. That's possible. That is a possibility, yes.

Q. And figure if you leave your employment you might ask Mr. Hardy for a recommendation?

A. I have not.

Q. I know. I said you would?

A. Not necessarily.

Q. Don't think so, huh?

MR. VENICK: Excuse me for one second, Your Honor.

Q. Do you recall Mr. Hardy ever calling you a dumbass?

A. On occasions I have been called several things. I in turn have called him several things.

Q. That was in the course of conversation between you and he?

A. Yes.

Q. Not in public?

A. Oh, it was in public.

Q. Okay.

[p. 175] MR. VENICK: I don't have any further questions, Your Honor.

REDIRECT EXAMINATION

BY MR. CHERNAU:

Q. Just one point and I am not going to belabor this at all. You made an interesting comment. You say you have testified in some of the cases with - well, we had one case with that fellow that -

A. Carl Myers, yes, sir.

Q. Did you testify in any of the other cases with Cellular Power? I can't even remember.

A. No, sir, the Cellular Power I wasn't any part of that.

Q. I know. Did you testify in any trials?

A. No, sir.

Q. You say this is the first case that somebody didn't tell you we are going here or going there; is that correct?

A. That's right. Other than I was told seventh floor, Judge Sandidge.

Q. And I also told you that I was going to put you on the witness stand, send you a subpoena and ask you what the conditions were at Forklift?

A. That's true.

Q. Thank you very much for coming up.

[p. 176] THE WITNESS: Am I through?

THE COURT: I don't know.

MR. VENICK: Nothing further, Your Honor.

THE COURT: Yes, you are through.

MR. CHERNAU: Can I let him leave?

MR. VENICK: Your witness.

MR. CHERNAU: Well, do you want him any more?

MR. VENICK: I don't care.

MR. CHERNAU: You may leave.

(WITNESS EXCUSED.)

* * *

THE COURT: Next witness.

ANGELA HICKS SHAPIRO was called, and being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CHERNAU:

THE COURT: Have a seat right here. Once seated, state your full name.

THE WITNESS: Angela Hicks Shapiro.

Q. Where are you employed?

A. WKRM Radio, Columbia, Tennessee.

Q. Do you live in Columbia?

A. Yes, sir.

Q. How long were you employed at Forklift Systems?

A. Roughly three months.

[p. 177] Q. Do you recall what three months?

A. No, sir, I surely don't.

Q. Do you recall what year it was? Eighty-seven?

A. Eighty-seven.

Q. Eighty-seven. And did you quit your job out there?

A. It was more of a mutual decision. It was a discussion and an agreement that I would leave the firm.

Q. Why did you leave?

A. Several reasons. The initial reason that we were I was called into the office is I had a disagreement with

Stephanie Vanns, the secretary, whereas we discussed further the problems that I was incurring at the company and decided that it would be best that I just leave.

Q. Did any of your problems relate to Teresa Harris?

A. Yes, they did.

Q. What kind of problems?

A. Just personal discrepancies. Just general things. Couldn't get along, rudeness, things of that nature.

Q. On the part of Teresa Harris?

A. Yes.

Q. During the three months you were there, how would you describe the environment out there? Would you [p. 178] describe it as a place where there were a lot of jokes and levity going on?

A. Most certainly. A lot of jokes and cracks up. Business atmosphere; however, there was a lot of joking and cracking going on.

Q. Did you find anything that Mr. Hardy or anyone else out there said offensive to you?

A. No.

Q. Did you think it was a sexually hostile environment out there?

A. In no way.

Q. In no way?

A. In no way.

MR. CHERNAU: You may ask.

CROSS EXAMINATION

BY MR. VENICK:

Q. Good morning, Ms. Hicks.

A. Good morning.

Q. You don't really care for Teresa Harris, do you?

A. She doesn't bother me one way or the other.

Q. That's not what you told me on the telephone. Didn't you tell me that you didn't care for her?

A. If you asked me, I may have.

Q. Is that your testimony today?

[p. 179] A. That I don't care for Teresa Harris.

Q. As I take your testimony you were given the choice of resign or be fired?

A. No.

Q. That's not the case?

A. No, it was a discussion between myself and Mr. Hardy's daughter, the office manager.

Q. That wasn't my question. Were you given a choice to resign or be fired?

A. No, not to the best of my knowledge.

Q. You blame Teresa Harris for you resigning, as you like to put it?

A. No.

Q. And it is your testimony that you never saw Mr. Hardy make any kind of comments or any kind of statements that affected your physical attributes as a woman; is that your testimony?

A. Yes.

Q. Never made any comments about your breasts?

A. Lots of people make comments about my breasts.

Q. I am not asking about lots of people. I am asking about Mr. Hardy.

A. Not any that were offensive, no.

Q. What kind of comments did he make?

A. I couldn't tell you. None that I am aware of. [p. 180] That's been some time ago.

Q. You can't recall?

A. Mr. Hardy - not to the best of my knowledge Mr. Hardy never made any comments about my breasts.

Q. You don't recall Mr. Hardy asking you or any other females to remove coins from his pockets?

A. Heavens no.

Q. Heavens no? Never saw that?

A. No.

Q. And you never saw Mr. Hardy throw coins on the floor and ask female employees to pick them up?

A. No.

Q. Ms. Hicks-Shapiro, understand you are under oath?

A. Yes.

Q. You understand that if you don't tell the truth, you are subject to perjury?

A. Yes.

Q. No further questions.

REDIRECT EXAMINATION

BY MR. CHERNAU:

Q. Now that he's explained that to you, would your answers be any different?

A. No, sir, I have answered that to the best of my knowledge.

[p. 181] MR. CHERNAU: If the Court doesn't need the witness, the witness is finished.

Does anyone object to the witness remaining in the courtroom to hear the rest of the case? Is that all right with Your Honor?

MR. VENICK: We object.

MR. CHERNAU: On what grounds?

MR. VENICK: You asked if we objected. We object.

THE COURT: Next witness, please.

(WITNESS EXCUSED.)

* * *

MR. CHERNAU: That's the Defendant's proof.

THE COURT: Any rebuttal proofs, Mr. Venick?

MR. VENICK: Yes, Your Honor.

THE COURT: They have rested their proofs.

PLAINTIFF'S REBUTTAL

THE COURT: We are in rebuttal proofs. Don't put on anything you should have put on in chief. Just to rebut new stuff.

MR. VENICK: I am going to try hard not to, Your Honor.

ALBERT LYTER, III, was called, and being duly sworn, was examined and testified as follows:

[p. 182] DIRECT EXAMINATION

BY MR. VENICK:

THE COURT: Have a seat and then state your full name.

MR. VENICK: Mr. Lyter is being offered as an expert witness. I will read Mr. Lyter's qualifications to the Court.

THE COURT: Well, spell your last name.

THE WITNESS: L-Y-T-E-R. Name is Albert H. Lyter, III.

Q. Mr. Lyter's educational background is he has a Bachelor of Science in Chemistry from Oklahoma City University. Has a Bachelor of Science in Biology from Oklahoma City University, and an M.S. in Forensic Science from George Washington University.

He has had additional training in questioned document examination from the United States Secret Service, and since September 1981 to present he has been President and Chief Scientific Officer of Federal Forensic Associates, Inc., in which he is engaged in examination, consultation, training, research and testimony in all areas of forensic science including ink and paper analysis, trace evidence, drug analysis, blood alcohol, serology and questioned document examination.

From January 1975 to September '81 he was a [p. 183] forensic chemist with the U.S. Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, National Laboratory Center, Rockville, Maryland, where he engaged in consultation, examination, training, research and testimony as service to federal and state law enforcement agencies. He has been qualified as an expert in federal, state and military courts in over 20 states and abroad.

He is an instructor at the FBI Academy, Federal Law Enforcement Training Center, Naval Investigative Service, Air Force Office of Special Investigation, United States Secret Service and colleges and universities.

He is a member of the American Academy of Forensic Sciences and the International Association of Forensic Sciences. Has a number of publications to his credit including "Comparison of Paper Samples" in the *IAI News*, "Analysis of Ball Pen Ink by High Pressure Liquid Chromatography" in the *Journal of Forensic Science*, "Comparison of Typewritten Carbon Paper Impressions" in the *Journal of Forensic Science*, "Analysis of Writing Ink", a chapter in the book *HPLC in Forensic Science*, "Ink Analysis" in *Trial* magazine, and "A High Performance of

Liquid Chromatographic Study of Seven Common Explosive Materials" in the *Journal of Forensic Science*.

He has participated in the Mormon will case of Howard Hughes, the corruption trial of the city inspectors [p. 184] in the City of Chicago, the slander trial against Dan Rather and CBS, and the bombing of the Police Commissioner of Bessemer, Alabama.

We would like to offer Mr. Lyter as an expert in the area of questioned document examination.

THE COURT: Any objection?

MR. CHERNAU: Heavens no.

THE COURT: Okay.

Q. Okay, Mr. Lyter, if you will please read, pursuant to local court rule, your testimony.

A. "Comes the Plaintiff, Teresa Harris, by and through her counsel, pursuant to Rule 12(c)(6)(c), Local Rules of the Middle District of Tennessee, who submits the direct testimony of Albert H Lyter, III, forensic chemist:

In March 1990 I examined certain documents from the personnel file of Teresa Harris maintained by the defendant and various entries contained in the 1987 desk calendar of Charles Hardy, President of the Defendant, Forklift Systems, Inc. The documents I examined were provided to me by Stanley Chernau, Defendant's counsel, in his office.

I examined the following 30 different entries from Mr. Hardy's desk calendar: 1-5, 1-8, 1-15, 1-29, 2-2, 4-30,

5-7, 5-25, 5-26, 5-27, 5-29, 6-1, 6-22, 6-30, 8-18, 9-1, 9-8, 9-18, 9-22, 9-29, 10-1, 10-2, 10-9, 10-17," [p. 185] "10-21, 11-13, 11-16, 11-23, 11-25, and 12-30.

I selected entries which spanned the dates of the entire calendar as well as certain entries which I was requested to examine in particular.

I also examined two separate documents taken from Teresa Harris's personnel file (A and C below) and one from the personnel file of Kathy Kernell (B below).

A. A sheet of paper approximately six by eight inches bearing the heading Aaron Rents with a note dated 6-1-87.

B. A sheet of paper approximately six by eight inches bearing the heading Aaron Rents with a note dated 2-23-88.

C. A sheet of paper approximately six by eight inches bearing the heading Advance with a note dated 8-18-87.

A chemical and physical examination was conducted" -

THE COURT: Stop right there. Which one of the exhibits that are in the thing were the last 6 by 8 sheets so that I can follow his upcoming statements?

MR. VENICK: Yes, Your Honor.

THE COURT: And I might point out that all of these things on the desk calendar that he examined have not been made part of this record.

[p. 186] MR. VENICK: Yes, Your Honor, we asked to admit them.

THE COURT: There is only a portion of them here. Did you ask for the whole desk calendar?

MR. CHERNAU: He asked for the entire desk calendar. I said I wouldn't give it to him and you ruled that I would give him those pages that he first handed up and examined Mr. Hardy about. That was the only part of the desk calendar that was supposed to be examined.

THE COURT: All right.

MR. VENICK: Your Honor, I believe it is Exhibits 6, 7, and 8. I believe that's correct

THE COURT: How about Exhibit 5?

MR. VENICK: That's correct.

THE COURT: Okay, go ahead.

A. "A chemical and physical examination was conducted upon the above-referenced exhibits. The physical examination included review of the documents with the unaided eye as well as with magnification ranging from 10 to 30X. The chemical examination included the use of a technique called thin layer chromatography (TLC). TLC is used to separate the components of the various ink formulations, thus making a comparison between samples, and with standard ink formulations possible. The use of reflectance spectrophotometry or densitometry was also" [p. 187] "used as a means of quantitating the various components of the ink formulations. By measuring the amounts of the various ink components, a relatively aging analysis was possible using certain examined

entries as comparison standards indicative of a specific preparation date. The results of these analyses are as follows:

1. Among the exhibits a total of six blue ball point ink formulations and four black ball pen ink formulations were found.

2. All of these ink formulations are similar to standard ink formulations which were available at the dates appearing on the exhibits.

3. One blue ball pen ink formulation was only found on five different entries in Charles Hardy's 1987 desk calendar: 5-25, 5-26, 5-27, 6-1 and from the entry dated 8-18 the words "recept. quit/discussed situation/ must change, promised it would".

4. A relative aging examination was conducted upon the following dated entries from Charles Hardy's 1987 desk calendar: 1-15, 1-29, 5-29, 8-18 the words "terminate if doesn't", 9-29, 10-9, 11-13, and 11-25; and the sheet of paper approximately 6 by 8 bearing the heading Aaron Rents with a note dated 6-1-87 taken from Teresa Harris's personnel file. The results indicate a difference in preparation time between the document dated 6-1-87 and" [p. 188] "that portion of the entry dated 8-18 including the words "terminate if doesn't" and the other dated entries.

Based upon my examination of the above - described documents I am of the opinion that the entries in Charles Hardy's 1987 desk calendar dated 5-25, 5-26, 5-27, 6-1 and from the entry dated 8-18 the words "recept. quit - discussed situation - must change, promised it would" were

added to the calendar on a date other than the date appearing on the entry.

With respect to that portion of the 8-18 entry on Charles Hardy's 1987 desk calendar including the words "terminate if doesn't" and the document from Teresa Harris's personnel file with the heading Aaron Rents dated 6-1-87, I am of the opinion that these entries were written sometime after January 1, 1988, and not on the date appearing on the entry."

Q. Now, with respect to your testimony, Mr. Lyter, could you please explain for the Court what the process of physical examinations that you went through with respect to these documents?

A. Physical examination was merely an examination of the entire documents by means of the unaided eye as well as with magnification. We were looking here for the various colors and types of writing instruments that might be present in an attempt to try to classify or group [p. 189] together writings that may have been made with the same writing instrument or a similar type writing instrument, and we were looking for various characteristics in the line such as striations, glooping or blobbing that might occur with a ballpoint writing instrument.

Q. What significance is there to the pattern of the preparation of the documents?

A. In documents of this type it is normal practice by individuals to use one of two separate types of preparation. One is to use the same kind of writing instrument to do it in its entirety. In other words, they have a pen

sitting on their desk, carry a pen in their pocket and they will use that pen to make all of the entries.

The other possibility is they may use a number of different pens, in which case there would be no pattern throughout the document. One entry would be made with one kind of ink, the entry on the next page would be made with a totally different kind of ink, and there really wouldn't be any pattern as such.

Q. And what was it you found with respect to these documents with respect to their pattern that was significant to you?

A. The diary in its entirety contained I believe six different kinds of ink of one kind and four of another. [p. 190] However, a majority of those entries were found rotated continuously throughout the document in that you would find the same kind of ink that occurred in the beginning of the document to the end of the document.

The only place that we found this one kind of ink which I reported on the May dated entries and the June first entry as well as an entry on 8-18 which was in fact the second entry in a row, that particular entry contained more than one kind of ink. And the second one as if it was done sequentially was of the same kind of ink used in May. But those were the only entries we found in the diary that contained that kind of ink.

Q. And what is the process of chemical analysis that you have gone through with respect to these documents?

A. Chemical analysis starts by means of removing small portions of the written line. We did this with a

hypodermic-sized hole punch. We then take those samples and do a technique which is called thin layer chromatography, and it in essence results in a separation of the various components of the ink so you can compare one writing with the next to see whether they have the same components or not.

The technique has been found to differentiate between ink formulations or recipes of ink, but it cannot differentiate different batches of ink so that if say two [p. 191] different pens were used of the same type, they would show up being the same ink formulation but not the same pen.

That technique is also the prerequisite for doing quantitative measurements of the amounts of these certain dyes that are present. And as ink gets older or is on the paper longer, the ability to actually extract the ink and these various components will change.

So by measuring the ability of extracting of the dye components in one writing, you can compare it with other writings that we know were done on certain dates or at least not questioned. And if in fact the questioned entry did not compare favorably with those entries, then it would indicate being done at a different time.

Q. And based upon that analysis, what was your conclusion?

A. We found that two entries, one dated 8-18 in the calendar, that was the entry that says "terminate if doesn't", as well as the writing that was found on the Aaron Rents document dated 6-1-87 were comparatively speaking dissimilar to the other entries that were made at

on or about those dates in the calendar dated that way in the calendar. They were in fact similar to entries made at the end of the calendar date. In other words, at the end of 1987, beginning of 1988 and, therefore, not consistent with the dates that appeared on the actual entries or the [p. 192] exhibit.

Q. And, therefore, as you stated, more likely to have been prepared after January first, '88?

A. That's correct.

MR. VENICK: I have no further questions, Your Honor.

CROSS EXAMINATION

BY MR. CHERNAU:

Q. Did you say, sir, that in looking at a situation like this that if there was a number of different pens used and I am not trying; don't hold me technically because I don't know what I am talking about. I am just trying to get to the facts. Using a number of different pens, there would be no pattern? You said - let me help you. Your statement was under normal practice someone carries a pen in his pocket or on his desk. He picks it up and uses it. Then did you say that the use of a number of different pens there wouldn't be that pattern?

A. Not necessarily. There can be a pattern no matter how many different pens are used. For instance, I have seen situations where somebody will take out five different pens and prepare a document at one setting but there is a consistent pattern in the usage of those pens.

Most of the time, as I mentioned, we cannot say it was a specific pen.

[p. 193] Q. Okay, hold that thought just one second. So sometimes you have a pattern with the pattern is that I am using three pens and use one on the same document, two on the same document and three on the same document, but then I start over again and use one, two and three again; is that correct so far?

A. I have seen that pattern, yes.

Q. Isn't that the pattern you just described to me where a number of pens are used in the document but the rotation of use of the pens follows the same pattern?

A. That's correct.

Q. Okay. Now, is it necessary or did you in this case ask Mr. Venick if he had any knowledge of Mr. Hardy's habits in regard to the use of pens?

A. I don't believe I requested because it wasn't necessary.

Q. It wasn't necessary?

A. That's correct.

Q. All right. Why wasn't it necessary?

A. First off we are dealing more with the kinds of ink that are used as opposed to the kind of pens.

Q. Okay, but can we say with pens -

A. Can I finish, please?

Q. Sure, go ahead.

A. We can in fact not distinguish pens, as I said, [p. 194] and there is in fact a number of instances where the same kind of pen may be used and yet different pens of that kind may be used. So we deal almost strictly with the kind of ink that's present on the document.

Q. And then the other things was - I am going to come back to that in a minute. And then the other thing was that you know that they were done at certain dates because at least those things that were done were not questioned. You were only dealing with what was questioned so you assumed that the other things on that date were written on that date?

A. There were assumptions that we made about the preparation date of certain entries, that's correct.

Q. So the assumption that you made was if I showed you a sheet that had one, two, three comments on it and I told you that what I want you to do is tell me about this number three comment, and doing the process that you do you assume that this comment and this comment was made on that date as indicated; isn't that correct?

A. Not necessarily, no.

Q. It is not?

A. That particular situation was not evidenced in this book. What we did was assume that the book was not fabricated in its entirety, and I did find no evidence to indicate that.

[p. 195] Q. Found no evidence to indicate that?

A. To indicate that it was fabricated all at one time.

Q. Well, you are saying fabricated. What do you mean fabricated?

A. Well, in order for there to be entries that span a year, if they were all done at one time then that's a fabrication. In other words, it's not -

Q. Were you asked to look at that?

A. I was asked to look at the document and to determine whether or not there were entries in the diary that were consistent with that date of preparation or inconsistent with that date of preparation.

Q. Were you told then as an assumption that any entry on any particular day on any particular page in that calendar was made on the date indicated, that other things were made when indicated but there were a few things that we don't think were made when indicated and we want you to check those?

A. I was not told specifically that the entries were in fact considered legitimate or non-contentious. However, the visual examination led me to believe that several of those entries were consistent with normal preparation.

Q. Okay. Did Mr. Venick volunteer to you the fact [p. 196] that Mr. Hardy had showed him a desk drawer of pens that he uses at his office?

A. I don't recall.

Q. Did you have any conversation at all at any time?

A. We may have, but I don't specifically recall.

Q. You don't recall any conversation about Mr. Hardy showing Mr. Venick the number of pens that he collects and uses?

A. I do remember him saying that he was a collector of pens, but I don't remember that he said -

Q. But you don't remember the part where he uses them all?

A. No. I don't recall that.

Q. And your testimony is that on these two entries, 8-18 and 6-1, that they according to your tests were not done on the day that they were entered?

A. That's correct.

Q. I have no other questions.

MR. VENICK: Nothing further, Your Honor.
(WITNESS EXCUSED.)

* * *

THE COURT: Next rebuttal witness.

MR. VENICK: Dick Reed, Your Honor.

MR. CHERNAU: Is this are you calling him back [p. 197] as rebuttal?

MR. VENICK: Yes, it is rebuttal testimony.

THE COURT: Get him in here.

MR. CHERNAU: Let's go.

DICK REED was recalled, and having been previously sworn and remaining under oath, was examined and testified as follows:

THE COURT: You are still under oath, Mr. Reed.

DIRECT EXAMINATION

BY MR. VENICK:

Q. Mr. Reed, do you recall meeting with Charles Hardy in the fall of 1987 to discuss the situation with Cellular Power Systems and Larry Harris?

A. Meeting with Larry Harris?

Q. Yes.

A. Yes, sir.

Q. Do you recall the purpose of that meeting?

A. Yes. It was mainly to do with Carl Myers, a former employee.

Q. Were there any statements made in that meeting that business between Forklift Systems and Cellular Power Systems was going to stop?

A. Not that I recall, no.

Q. Do you recall meeting with Mr. Hardy prior to the meeting with Mr. Harris during which time Mr. Hardy [p. 198] discussed the need to terminate the business relationship with Cellular Power Systems?

A. To terminate the business relationship?

Q. Right.

A. No, I don't.

Q. Do you recall meeting with Mr. Hardy again prior to the meeting with Mr. Harris in which he discussed with you the necessity of having to terminate Teresa Harris as an employee of Forklift Systems?

A. No, no.

Q. When did you become aware of the termination of the business relationship with Cellular Power Systems?

A. When I saw a copy of a letter written by the sales secretary cancelling the orders.

Q. You had no knowledge prior to that time?

A. Not that we were going to terminate, no.

Q. Or that you had terminated?

A. No, no.

Q. Do you recall a Forklift employee by the name of Angela Hicks?

A. Yes, I do.

Q. What happened with Angela Hicks as far as her employment is concerned?

A. It was terminated.

Q. How do you know it was terminated?

[p. 199] A. Well, I was told it was by -

MR. CHERNAU: I object to this. It is hearsay.

Q. By whom?

MR. CHERNAU: I object to this. It is hearsay.

THE COURT: It could be hearsay and it could not be.

Q. By whom?

A. By the office manager.

THE COURT: Sustained.

MR. VENICK: Your Honor, if I may go a little further.

THE COURT: All right.

Q. That was Kathy Kernell?

A. Yes.

Q. Was Kathy Kernell responsible for disciplining of employees at that time?

A. She was supervising the office personnel at that time, yes.

Q. And her responsibility was to hire and fire employees or to tell them they were hired and fired?

A. Yes.

MR. VENICK: Your Honor, she was an agent.

MR. CHERNAU: Go ahead. It is still hearsay.

THE COURT: Let it in.

MR. VENICK: Thank you, Your Honor.

[p. 200] Q. What was your understanding of why she was terminated?

A. Well, I was called by Kathy on the phone intercom to determine what her work was like and what her

demeanor had been like, and I just gave my opinion. And after that I was told by Kathy she was terminated.

Q. And what was your opinion?

A. I said she was doing satisfactory work.

Q. Were you involved in the termination of an employee by the name of Stephanie Vanns?

A. Yes.

Q. And this is when you were the personnel manager of Forklift Systems; is that right?

A. Right.

Q. Do you recall why she was terminated?

A. Terminated for just general attitude and general work requirements that weren't met.

Q. What did Charles Hardy tell you to do regarding her personnel file?

A. He asked me to review it. Add a couple of items in there that we felt were necessary.

Q. Were those items that you added necessarily true?

A. I wouldn't say so, no.

Q. That was something that Charles Hardy told you [p. 201] directly to do?

A. Yes.

MR. VENICK: No further questions, Your Honor.

CROSS EXAMINATION

BY MR. CHERNAU:

Q. You added something to a personnel file that wasn't true, sir?

A. I said that it was not necessarily true.

Q. Why would you add something to a personnel file that was not necessarily true? You said "we added what we felt was necessary" and then you said not necessarily true. Why would you do that?

A. It is a question of whether it is completely true or was it substantially true.

Q. Carl Myers, when you discussed Carl Myers did it come up in the discussion or did you know from knowledge from anyone else that Carl Myers was an employee of Forklift Systems who had been accused of and admitted taking money?

A. Now, break that down for me. You have got several things in there. I don't understand your question.

Q. All right. Did you ever hear that Carl Myers had stolen money when he was working for Forklift Systems?

A. No, I didn't hear he had stolen money.

Q. So today do you know whether he stole any [p. 202] money?

A. No. To my knowledge he did not steal any money.

Q. So, therefore, you don't know that he admitted that he stole the money?

A. I don't know that.

Q. Do you know that Carl Myers had instituted a suit for commission?

A. At what time did I know that?

Q. Do you now as you sit here know that he had instituted a suit?

A. Yes.

Q. Did you come in from Kentucky to be a witness for that?

A. Yes.

MR. VENICK: I believe he's gone beyond the scope of direct.

MR. CHERNAU: Talking about Carl Myers.

THE COURT: I can't tell yet.

Q. You came in from Kentucky for Carl Myers' case; is that correct?

A. Correct.

Q. Who called and asked you to come in for that?

A., I was subpoenaed.

Q. You were subpoenaed by who?

[p. 203] A. By Teresa.

Q. By Teresa Harris?

A. Or Larry Harris. I have forgotten how the case was set up.

Q. Larry Harris represented Carl Myers, didn't he?

MR. VENICK: That's Larry Wilson.

Q. I'm sorry, Larry Wilson represented Carl Myers in that case?

A. Yes.

Q. And Teresa Harris wasn't involved in that case at all, was she?

A. What do you mean by involved?

Q. This is a case of Carl Myers suing Forklift Systems. What has that got to do with Teresa Harris?

A. I believe she was called as a witness in it.

Q. You believe she was called as a witness by whom?

A. I don't know.

Q. Did she ever go on the witness stand?

A. I don't know.

Q. You were there. Did you see her?

A. I believe she did.

Q. You think that Teresa Harris went into the courtroom and testified?

A. I believe she did.

[p. 204] Q. Well, she didn't. Did you?

A. No, I don't think I did.

Q. I don't have any further questions.

MR. VENICK: No further questions, Your Honor.

(WITNESS EXCUSED.)

* * *

THE COURT: Next rebuttal witness.

MR. VENICK: Call Stephanie Vanns.

THE COURT: All right. If you will call her, please.

MR. CHERNAU: May I go ahead and take that down?

THE COURT: Just cover it up for the time being.

MR. CHERNAU: May I go cover it up?

THE COURT: It bothers you? Cover it up.

STEPHANIE VANNS was called, and being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. VENICK:

THE COURT: You are still under oath with respect to your testimony in this case; understand?

THE WITNESS: Yes, sir

Q. Ms. Vanns, you have previously testified about some comments that you heard Mr. Hardy make while you were [p. 205] an employee of Forklift Systems?

A. Yes, sir.

Q. Were any of those comments made or directed towards Angela Hicks?

A. Some were, some weren't.

Q. What comments were directed towards Angela Hicks that you can recall?

A. I am sure he probably said about quarter in the pocket.

Q. Do you ever recall Mr. Hardy making any comments about her physical attributes?

A. Pardon me?

Q. Do you ever recall Mr. Hardy making any comments about her physical attributes?

A. Such as in what? I don't understand.

Q. Such as her breasts or any other parts of her body?

A. All the men did.

Q. Mr. Hardy included?

A. I am sure he - I think he said maybe a joke about it.

MR. VENICK: No further questions, Your Honor.

MR. CHERNAU: I have no questions.

(WITNESS EXCUSED.)

* * *

[p. 206] THE COURT: Next witness.

DAVID THOMPSON was called, and being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. VENICK:

THE COURT: Have a seat and then state your full name.

THE WITNESS: My name is George David Thompson.

Q. You were formerly employed by Forklift Systems?

A. Yes, sir.

Q. What was your position?

A. I was a sales representative.

Q. And you are currently employed at Myers Truck; is that correct?

A. And Caster.

Q. Do you recall having discussions with Teresa Harris about her leaving Forklift Systems in September of 1987?

A. Yeah, we talked about her leaving.

Q. Can you tell the Court why she told you she was leaving?

MR. CHERNAU: Please the Court, what is this rebutting? I object to this.

MR. VENICK: This is rebutting -

MR. CHERNAU: Point of her direct testimony.

[p. 207] It is not rebutting anything.

MR. VENICK: If Mr. Chernau is finished, I will be happy to tell the Court. They say Mrs. Harris left because of a deteriorating business relationship with her husband. That is contradicting my client's theory of the case.

THE COURT: Go ahead. Overrule the objection.

Q. What do you recall her telling you as to why she was leaving?

A. That she was unhappy and that she felt like that she wanted to leave just mainly because she was unhappy and she felt like she wasn't being treated fair.

Q. Did she make any comment to you whatsoever about the deteriorating business relationship between Cellular Power and Forklift Systems?

A. None that I know of.

MR. VENICK: No further questions, Your Honor.

THE COURT: All right.

CROSS EXAMINATION

BY MR. CHERNAU:

Q. Mr. Thompson, do you recall when the EEOC complaint was filed and it was necessary for you to give a statement around May of 1988?

A. Is this when I came to your office?

Q. Yes.

[p. 208] A. Yeah, I do remember that.

Q. Do you recall in answering one of the questions put to you by the EEOC your answer to whether you could verify statements that Charles Hardy had made to Teresa, "Teresa, we are going to the Holiday Inn to negotiate" - they have got rave down here, R-A-V-E, but it is raise. Do you remember that?

A. Yes, I do remember that.

Q. And was -

MR. VENICK: Your Honor, -

Q. I am going to ask you if this is your answer.

MR. VENICK: I believe this is beyond the scope of the direct.

THE COURT: Are you going to make this relevant on some issue?

MR. CHERNAU: I will tell you exactly why it is relevant. The reason it is relevant is that I say all of this came about because of this soured business relationship. She says it was because of a hostile sexual environment.

I am going to get this witness put on by the Plaintiff to prove that there wasn't a sexual hostile environment and that she left just as he says because she was unhappy and because he didn't know about the Cellular problem doesn't mean it didn't exist.

[p. 209] THE COURT: Okay, go ahead.

MR. VENICK: Your Honor, object

THE COURT: I think it is relevant. Go ahead.

BY MR. CHERNAU:

Q. Do you remember this being your answer:

"Charles Hardy, myself and Gordon Coffman, a factory representative, and Teresa Harris on one occasion had lunch at the Executive Inn in Nashville, Tennessee. Part of the luncheon conversation had to do with business and compensation. To the best of my recollection when we were walking out from lunch, I think Teresa said to Charles Hardy, 'When am I going to get a raise?' And she said this in a joking manner. Mr. Hardy then jokingly said to the best of my recollection, 'We'll negotiate your raise at the Holiday Inn.' The statement was a joke. It was taken as a joke and everyone knew it."

A. That's the way I took it.

Q. Right. Then you were asked a question, "What other lewd or sexist remarks have you heard Mr. Hardy make towards complainant?"

And was this your answer, "As I said in answer to question number 1, what Charles Hardy said was a joke and everyone knew it. I do not know of any other remarks"?

MR. VENICK: Your Honor, this document is not being made an exhibit. It is an improper method of examining this witness.

THE COURT: He hasn't disagreed with it yet. If he disagrees with it, he can put it in.

[p. 210] A. At that point there were other things said, but I personally always took them as a joke, okay? I did not answer the question no, there was nothing else said, but I always took what was said as a joke.

Q. And that's what I am trying to establish. Do you recall this being your answer to this question: "Did you ever state to complainant," - that's Teresa Harris then since you knew her as Teresa -

THE COURT: Teresa Lynch.

Q. Excuse me.

"Did you ever state to complainant that if Mr. Hardy or any man talked to your wife the way Mr. Hardy talked to complainant, you wouldn't put up with it?"

Then you've got "Answer on back." Was this your answer:

"I cannot answer yes or no. The reason is that at one time she or her husband asked me the question and I said, 'No, but my wife would not use the kind of language that Teresa uses' "?

A. You need to read that again. I didn't catch the whole drift.

Q. Of the answer?

A. Of where you started.

Q. This was your answer to the question.

A. What was the question?

Q. "Did you ever state to complainant," -

[p. 211] A. Complainant?

Q. Mrs. Lynch-Harris.

A. Ms. Lynch?

Q. "That if Mr. Hardy or any man talked to your wife the way Mr. Hardy talked to complainant that you wouldn't put up with it?"

A. I probably said that.

Q. Did you hear the answer?

A. Did I ever state - that was a question right dead the way I heard it, and I am answering yes, I did state that.

Q. The answer is, "I cannot answer yes or no. The reason is that at one time she or her husband asked me the question and I said, 'No, but my wife would not use the kind of language that Teresa uses' "; is that correct?

A. I didn't say that to Teresa that I remember, but I said that in person that - well, what I said to Teresa was I would not want my wife talked to that way and I wouldn't put up with it, okay? But then I said later, not to Teresa at the time, that my wife does not use that type of language.

Q. All right, the last question. And this is the last question.

THE COURT: You are talking about the type of language that Teresa used?

[p. 212] THE WITNESS: Yes, sir.

Q. Last question. The question is,

"Is there any other information you want to add concerning sexist behavior towards complainant by Mr. Hardy? Please present it."

And this was your response, and I am going to ask you if it was accurate.

"I like Teresa Harris and I am not on anyone's side in this case. However, there is no question that the statement about the Holiday Inn was a joke and she knew it. I do not know about any other remarks."

A. Yes, I said that.

Q. Thank you.

MR. VENICK: No further questions, Your Honor

(WITNESS EXCUSED.)

* * *

MR. VENICK: Can we take a short break, Your Honor?

THE COURT: Let's move on. Do you have another witness on rebuttal proof? I am trying to close the proofs altogether.

MR. VENICK: Yes, Your Honor. One second.

THE COURT: All right. If you really want one, I will be glad to. My insistence was get the proofs closed. If you really want one, just insist a little more and I can be persuaded.

[p. 213] KIM HAMPTON was called, and being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. VENICK:

THE COURT: Once seated, state your full name.

THE WITNESS: Kimberly Dawn Hampton.

Q. Miss Hampton, you were formerly employed at Forklift Systems; isn't that right?

A. Yes.

Q. Actually technically you were employed by AmTemps who placed you at Forklift Systems?

A. Right.

Q. AmTemps is a temporary service; is that correct?

A. Yes.

Q. How long did you stay there?

A. I was there two months.

Q. What did you do there?

A. I was receptionist.

Q. Why did you leave Forklift Systems?

THE COURT: Well, what period of time was she there? Could have been two months in 1990.

MR. VENICK: I am so familiar with this case, Your Honor.

THE COURT: All right.

[p. 214] Q. When were you there, which two are we talking about?

A. I think it was July to the end of August in '88.

Q. How about '87?

A. It may have been '87. It's been a couple of years so I am not sure.

THE COURT: Well, let's see. Did you know Teresa Harris, she was then Teresa Lynch?

THE WITNESS: Yes.

THE COURT: Were y'all working there at the same time?

THE WITNESS: Yes.

THE COURT: Proceed.

MR. VENICK: Thank you, Your Honor.

THE COURT: I don't know why y'all didn't think of it.

A. I don't know when it was.

Q. How did you get along with Teresa Harris?

A. Fine. I liked Teresa really.

Q. And you left Forklift Systems voluntarily?

A. Yes.

MR. CHERNAU: Excuse me just a minute, Your Honor. She left. She was a temporary employee. She wasn't an employee of Forklift Systems. She was a [p. 215] temporary.

THE COURT: You were never an employee of Forklift?

THE WITNESS: It was a tried before hired. I was employed through AmTemps.

THE COURT: But you were there. Go ahead.

Q. Did you decide not to continue employment because of any reason of Teresa Harris?

A. No, it wasn't.

Q. And you didn't tell anybody at Forklift that you were leaving because of Teresa Harris?

A. No.

MR. VENICK: No further questions, Your Honor.

MR. CHERNAU: I don't have any questions.

(WITNESS EXCUSED.)

* * *

TERESA HARRIS was recalled, and having been duly sworn and remaining under oath, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. VENICK:

THE COURT: You too are still under oath. Have a seat.

Q. Mrs. Harris, you heard Mr. Hardy testify that he had complained to you on numerous occasions about your [p. 216] job performance?

A. Yes.

Q. You heard that testimony?

A. Yes, sir, I did.

Q. Do you recall Mr. Hardy complaining to you at any time about your job performance other than the one time you testified about with the two forks?

A. Oh, there was the incident about the forks and then in September he sent a memo. September of '87, excuse me. He sent a memo to me in reference to two units that I had put into the Leasing Department and in essence had - said I didn't - I should have not done that. And I disputed him. I wrote a memo back to him.

Q. Outside of those two incidents?

A. No, sir.

Q. Nothing else?

A. No, sir.

Q. What knowledge have you had of any deteriorating business relationship between Cellular Power Systems and Forklift Systems prior to October first of 1987?

A. There wasn't any. We at Cellular Power we had purchase orders dated September 28, 1987.

Q. To whom?

A. To Cellular Power from Forklift Systems.

Q. So you had no knowledge of any deteriorating [p. 217] business relationship?

A. No.

Q. When did you become knowledgeable about the terminated business relationship between Cellular Power and Forklift Systems?

A. We received a letter dated October 7 from - well, let me change. Can I say Larry said? I can't say that?

I saw a letter that we received in October that was dated October 7 that says, "This confirms our telephone conversation at 3:40 p.m. cancelling all orders", and it was signed Stephanie Vanns. It was dated October 7, 1987. That's when I knew about it.

Q. You had heard David Matthews testify about apparently a battery competitor being at Forklift Systems October first, 1987? You heard his testimony?

A. I heard that testimony, yes, sir.

Q. Do you recall there being any kind of battery dealer there that day?

A. There could have been, but I don't recall. That wasn't something that would upset me. I had dealt with competitors. I had issued purchase orders with Larry's competitors and I had gone to lunch with Larry's competitors. You know, it would be foolish of me to think that Larry Harris is going to get every battery order in [p. 218] Nashville. That's not going to happen. We have got competition.

I also I was friends with people in the lift truck, you know David and -

Q. David Gary?

A. No, you know you are not your competition's enemy and they weren't my enemies. I dealt with them.

Q. Why were you upset then on October first, '87?

A. I was leaving a job that I absolutely loved. I loved working in the lift truck business.

MR. CHERNAU: What are we rebutting now? She said that on direct.

THE COURT: You just reaffirm your prior testimony [sic] you liked the job?

THE WITNESS: I loved it, and I didn't leave because there was anybody there.

THE COURT: Okay. Have a seat, Mr. Chernau. Next question, Mr. Venick.

MR. VENICK: No further questions, Your Honor.

THE COURT: All right, cross examine.

MR. CHERNAU: I don't have any further.

(WITNESS EXCUSED.)

* * *

MR. VENICK: I want to take a five-minute break.

[p. 219] (A short recess was taken.)

LARRY HARRIS was called, and being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. VENICK:

THE COURT: Have a seat and then state your full name.

THE WITNESS: Larry Harris.

Q. Mr. Harris, you are married to Teresa Harris?

A. Yes, I am.

Q. And you are currently involved in a business called Metro Material Handling?

A. That's correct.

Q. Is that a successor to Cellular Power?

A. Not a successor. It is a separate company.

Q. Cellular Power still exists?

A. Right.

Q. There's been some testimony today that you had been informed by Charles Hardy in July, August, September of 1987 about his complaints about service that your business was providing to Forklift Systems; is that true?

A. No, sir, I was not aware of that. I was never told that.

Q. Never received any letters from Mr. Hardy to that effect?

[p. 220] A. No.

Q. Never had any conversations with him to that effect?

A. No, sir, I have not.

Q. So did you have any knowledge prior to October 7, 1987, that you had a deteriorating business relationship with Forklift Systems?

A. No, sir. Not until that time.

Q. There's also been testimony today that you were verbally informed on September 29, 1987, that all orders from Forklift Systems to Cellular Power would cease. Did that occur?

A. No, it did not.

Q. When in fact was the first time that you learned that the business relationship between Forklift Systems and Cellular Power was over?

A. It was either October 6 or 7 I received a call from Stephanie Vanns of Forklift Systems telling me the orders had been cancelled.

Q. And then you received a letter?

A. Yes.

MR. VENICK: No further questions, Your Honor.

CROSS EXAMINATION

BY MR. CHERNAU:

Q. Mr. Harris, do you remember the case you [p. 221] testified to in Chancery Court when we sued you on the note?

A. I remember, yes.

Q. Do you remember covering the relationship that you had with Charles Hardy?

A. I'm sorry, I don't understand your question.

Q. Do you remember being asked any questions concerning the business relationship between you, Cellular Power and Charles Hardy?

A. I am sure I was asked questions, but I don't remember what they were specifically.

Q. Well, do you remember whether or not we were talking about Charles Hardy being unhappy with the way you were running the business?

A. No, sir, I don't recall being asked that.

Q. You don't recall being asked?

A. No.

Q. Do you recall any situation regarding whether or not you and your wife could take a trip that she won and Charles Hardy said no because he wanted you in that office running that business? Do you recall anything about that?

A. No, sir.

Q. Do you recall any questions put to you and answers about Carl Myers?

A. Specifically, no.

[p. 222] Q. Okay. Do you recall any conversation at any time - forget the courtroom - with Mr. Hardy about him telling you don't hire Carl Myers; he stole money from us?

A. I remember having a conversation about Carl Myers, but I don't remember him saying he had stolen money from him.

Q. Do you remember him saying don't hire Carl Myers because we can't do business with Cellular?

A. No, sir.

Q. Okay. I don't have any more questions.

MR. VENICK: Nothing further, Your Honor
(WITNESS EXCUSED.)

• • •

THE COURT: That's the end of his rebuttal proofs. That's the end of the proofs.

MR. CHERNAU: I would like at this time at the end of the proof to renew the motion I made at the end of Plaintiff's proof.

THE COURT: Well, I will take it under advisement. Each one of you may file a written argument. If you so choose, do so in five days. Anything else?

MR. CHERNAU: I might ask a very simple question. Today is - what is today?

THE COURT: Monday. Tuesday, Wednesday, Thursday, Friday. Have it filed by the end of business [p. 223] Monday. A week from today will be fine.

MR. CHERNAU: All right.

THE COURT: Okay, anything else?

MR. CHERNAU: I have nothing else for the defense.

MR. VENICK: No, Your Honor. Thank you.

(Court was adjourned.)

• • •

[p. 224] REPORTER'S CERTIFICATE

STATE OF TENNESSEE)
)
COUNTY OF DAVIDSON)

I, Cathy Boone Leigh, Court Reporter with offices at 126 Babbs Drive, P. O. Box 571, Joelton, Tennessee, do hereby certify:

That I reported the hearing in the matter of HARRIS VS. FORKLIFT SYSTEMS, being Case No. 3:89-0557, on July 23, 1990; that said proceedings were reduced to typewritten form by me; and that the foregoing transcript (Volumes 1 and 2, pages 1 through 223) is a true and accurate record of said proceedings to the best of my skills and ability.

Further, that I am not kin to any of the parties involved therein nor their counsel, and I have no financial or otherwise interest in the outcome of these proceedings whatsoever.

This the 8th day of August, 1990.

/s/ Cathy Boone Leigh
Cathy Boone Leigh
Court Reporter

[p. 225] CERTIFICATE OF THE COURT

I, KENT SANDIDGE, III, Magistrate of the United States District Court for the Middle District of Tennessee, do hereby certify that I have read the foregoing transcript in the matter of HARRIS VS. FORKLIFT SYSTEMS held in open court on July 23, 1990, and have found the same to be a true and accurate transcription of the proceedings.

JUDGE

No. 92-1168

Supreme Court, U.S.
FILED
APR 30 1993
OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1992

—◆—
TERESA HARRIS,

Petitioner,

v.

FORKLIFT SYSTEMS, INC.,

Respondent.

—◆—
**On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**
—◆—

BRIEF FOR PETITIONER
—◆—

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QUESTION PRESENTED FOR REVIEW

1. Is a plaintiff in a sexual harassment case also required to prove, in order to prevail, that she suffered serious psychological injury when the Trial Court has found that she was offended by conduct that would have offended a reasonable person in the position of the plaintiff?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceedings below were Petitioner, Teresa Harris, and Respondent, Forklift Systems, Inc. Forklift Systems, Inc., is a private corporation organized under the laws of the State of Tennessee. Forklift has no parent nor subsidiary.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit has not been reported, but is reproduced in the Appendix to the Petition for a Writ of Certiorari, at A1-A3.

The opinion of the United States District Court for the Middle District of Tennessee has not been reported but is reproduced in the Appendix to the Petition for Writ of Certiorari App. A-4.

The Report and Recommendation of the magistrate, which constitutes the findings of fact and conclusions of law of the district court is reproduced in the Appendix to the Petitioner For a Writ of Certiorari at A5-A25.¹

JURISDICTION

This Court has jurisdiction pursuant to 102 Stat. 662, 28 U.S.C. § 1254(1) (1988). The judgment of the United States Court of Appeals for the Sixth Circuit was entered on September 17, 1992 (Pet. for Cert. App. A5), No Petition for Rehearing was filed. A timely Petition for Certiorari was filed on December 15, 1992, and this Court granted certiorari on March 1, 1993.

¹ The Appendix to the Petition for Writ of Certiorari is cited as "Pet. for Cert. App." The Joint Appendix filed with this Brief is cited as "J.A. ____".

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. §§ 2000e *et seq.*, provides, in pertinent, part as follows:

(a) It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Petitioner, Teresa Harris, commenced this action on July 7, 1989, in the United States District Court for the Middle District of Tennessee. She sued respondent, Forklift Systems, Inc., ("Forklift" or the "Company"), alleging that she had been discriminated against because of her sex in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. §§ 2000e, *et seq.*

Judge John T. Nixon referred the case to Magistrate Kent Sandidge for trial, report and recommendation.² (Pet. for Cert. App. A-5). Ms. Harris proceeded to trial

² Judge Nixon referred the case to the Magistrate pursuant to § 706(f)(5) of Title VII, 42 U.S.C. § 2000e-5(f)(5), Rule 53, F. R. Civ. Proc., and Local Rules of the Middle District of Tennessee. (Pet. for Cert. App. A-5).

under two theories, only one of which – sexual harassment – is before this Court.³ She alleged that she had been constructively discharged by Forklift because its President and Chief Executive Officer, Charles Hardy, had created and condoned a sexually offensive hostile work environment for female employees, the result of which caused her physical illness, anxiety and the need for medical care. Ms. Harris sought declaratory and injunctive relief including reinstatement and back pay. (J.A. 6-7).

The case was tried before the magistrate on July 23, 1990. The magistrate filed his report and recommendation on November 27, 1990.

Ms. Harris was employed by Forklift from April 22, 1985, until October 1, 1987. Her job included responsibility as a rental manager for leased equipment and as coordinator for the sales department. (Pet. for Cert. App. A-6). During the time that Ms. Harris was employed as a rental manager at Forklift, the Company employed five other managers. Of the six managerial employees, four were male, and two were female. The female managers were Ms. Harris and Kathy Kernell, who was the Office Manager and the daughter of Forklift's President, Charles Hardy. (J.A. 22). Mr. Hardy was Teresa Harris' supervisor.

The magistrate found that Mr. Hardy "is a vulgar man [who] demeans the female employees at his work place." (Pet. for Cert. App. A-14). He concluded that Mr.

³ Petitioner also pressed a disparate treatment claim (J.A. 20-21), which was dismissed upon recommendation of the magistrate. (Pet. for Cert. App. A-7).

Hardy subjected Ms. Harris to "a continuing pattern of sex-based derogatory conduct" (*Id.* at A-8), including "continuous inappropriate sexual comments," which ranged from the "inane and adolescent" to the "truly gross and offensive" (*Id.* at A-18, A-19). He found that Mr. Hardy's "demeaning sexual comments," were directed at Ms. Harris as well as at other female employees of Forklift, but not at the Company's male employees (*Id.* at A-17).

The specific evidence on which the magistrate based his finding that Ms. Harris was the object of a continuing pattern of sex-based derogatory conduct included the following:

(a) Mr. Hardy stated to Ms. Harris in the presence of other employees at Forklift, "You're a woman, what do you know," on a number of occasions and also stated, "You're a dumb-ass woman," (J.A. 45, 46). Other male employees also disparaged Ms. Harris by making the same remark. (J.A. 45).

(b) Mr. Hardy, on a number of occasions, stated to Ms. Harris, in the presence of other employees of Forklift, "We need a man as the rental manager." (J.A. 44-45).

(c) Mr. Hardy, in front of a group of other employees and a customer of Forklift, stated to plaintiff, "Let's go to the Holiday Inn to negotiate your raise." (J.A. 48).

(d) Mr. Hardy asked Ms. Harris and other female employees, but not male employees of Forklift, to retrieve coins from his front pants pocket. As Ms. Harris testified:

"He would say, Teresa, I have a quarter way down there. Would you get that out of my [front] pocket." (J.A. 48-49).

(e) Mr. Hardy threw objects on the ground in front of Ms. Harris and other female employees of Forklift, but not male employees, and asked them to pick the objects up, thereafter making comments suggesting how they should dress to expose their breasts. (J.A. 50-51).

(f) Mr. Hardy told female employees that he had heard that eating corn would make their breasts grow. (J.A. 50-51).

(g) Mr. Hardy commented with sexual innuendos about clothing worn by Ms. Harris and other female employees of Forklift but not male employees. (J.A. 51-52).

(h) Mr. Hardy told Ms. Harris on a number of occasions that she had a "racehorse ass," (J.A. 51), and said that she could not wear a bikini "because your ass is so big, if you did there would be an eclipse and nobody could get any sun." (J.A. 51-52).

(i) Mr. Hardy suggested that he and Ms. Harris should start "screwing around" even though he knew that she had been recently married. (J.A. 47).

Rather than dispute these statements and actions, Forklift took the position at trial that they were only "jokes" and were not taken seriously by other female employees. Three female clerical employees testified that they did not take the "coin" behavior seriously. (Pet. for Cert. App. A-11). The magistrate, however, found that these three clerical employees were conditioned to accept denigrating behavior from Mr. Hardy. (*Id.* at A-19).

Both Mr. Hardy and David Thompson, a former Forklift employee, acknowledged the offensiveness of Mr. Hardy's behavior. Ms. Harris' undisputed testimony is that Mr. Hardy acknowledged that he would not like men to talk to his wife or daughter⁴ the way he (Hardy) spoke to Ms. Harris (J.A. 98). David Thompson acknowledged that he wouldn't put up with a man talking to his wife in the sexually demeaning manner that Mr. Hardy spoke to Ms. Harris. (J.A. 233).

By the middle of 1987, Hardy's offensive behavior had made Ms. Harris anxious and emotionally upset. The magistrate found that Ms. Harris "was good at her job." (Pet. for Cert. App. A-11) However, because of Mr. Hardy's unwelcomed, vulgar and sexually demeaning conduct, by August, 1987, Ms. Harris did not want to go to work; she cried frequently; she began drinking heavily outside of work; and the relationship with her children became strained. (*Id.* at A-10). These findings are supported by Ms. Harris' unrebutted testimony about the effects of Mr. Hardy's conduct on the conditions of her employment:

"It embarrassed me. . . . The comments about how I looked embarrassed me, but the comments about my ability to do my job and that I was stupid and I was dumb devastated me. I hated walking in there. He embarrassed me. Everybody made fun of me because Charles Hardy did that. And I was supposed to laugh about it, and it wasn't funny." (J.A. 52).

⁴ The reference to "Sandra" in the transcript is to Mr. Hardy's wife; the reference to Kathy is to his daughter.

"I cried all the time. I was having shortness of breath. I wasn't sleeping at all. I was drinking heavily. I drank a lot. I would get drunk every night so I would go to sleep so I could get up and go to work the next day, and I hated it. I shook. I would sit in my office and I would shake. I hate it. I just hated it." (J.A. 52-53).

"I went to see my doctor. He ran tests on me. He did an EKG and he did chest x-rays because of the breathing problem, and there was nothing physically wrong with me. He attributed it to all the anxiety and gave me tranquilizers and sleeping pills." (J.A. 52).

"I was ugly to my children. My children would call me and I would be ugly to them and I would say terrible things to them and hang up on them. I always did that for Mr. Hardy's benefit because he made remarks to me about that too: 'Your kids call all the damn time. . . .'" (J.A. 56).

Mr. Hardy's "comments about . . . how I looked embarrassed me, but the comments about my ability to do my job and that I was stupid and I was dumb devastated me. I hated walking in there." (J.A. 52). Ms. Harris felt that Mr. Hardy's vulgar and demeaning remarks made her into a "joke" "[t]o everybody at Forklift Systems" (J.A. 45-46) and that "[e]verybody made fun of me because Charles Hardy did that." (J.A. 52).

On August 18, 1987, after enduring more than two years of Mr. Hardy's sex-based epithets, innuendos and other sexually demeaning conduct, Ms. Harris met with Mr. Hardy to complain about his abusive and harassing behavior, intending to submit her resignation. Without

Mr. Hardy's knowledge, Ms. Harris taped a portion of their conversation. During the meeting Mr. Hardy admitted that he had engaged in the conduct Harris complained of, but told her that he was only "joking", that his sexually offensive conduct only reflected his effort to treat her "like one of the boys." (J.A. 156). He promised to stop engaging in the offensive behavior. Relying upon Mr. Hardy's assurances that he would stop his offensive conduct, Ms. Harris agreed not to resign. (J.A. 58).

Mr. Hardy's promise, however, was shortlived. Within a few weeks after his August, 1987, meeting with Teresa Harris, Mr. Hardy again began directing sexually offensive and harassing remarks towards Ms. Harris. A particularly egregious episode led Ms. Harris to terminate her employment with Forklift. As she explained in her testimony:

[I]n September of 1987, I told him that I was working on a multiple lease deal at ASI, which is Aladdin Synergetics, and I really felt like we were going to get that order. He said, "What did you do, Teresa, promise the guy at ASI bugger Saturday night."

Ms. Harris understood, and the magistrate found, that his "bugger" remark implied that Ms. Harris had promised to provide sexual favors in exchange for a business deal with a customer. (Pet. for Cert. App. A-18); (J.A. 58-59). As a result of this conduct, Ms. Harris terminated her employment with Forklift on October 1, 1987. (J.A. 60).

The magistrate found that although female clerical employees tolerated Hardy's behavior, viewing it as the norm and as joking, to Ms. Harris his sexual comments

"were especially painful when [he] would make demeaning sexual comments to her in front of her co-workers." (Pet. for Cert. App. A-14). The magistrate found that Mr. Hardy's sexual comments offended Ms. Harris and would have offended a reasonable woman in her position. He did not find, however, that the behavior was sufficient to interfere with Ms. Harris' work performance nor so severe as to seriously affect her psychological well-being. (Pet. for Cert. App. A-19). Accordingly, under the authority of *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987), the magistrate recommended dismissal of Ms. Harris' hostile environment claim under Title VII.

Relying upon the finding that Hardy's behavior was merely annoying, the magistrate also recommended dismissal of Ms. Harris' claim of constructive discharge. The magistrate held that Ms. Harris failed to prove that Forklift intended that Ms. Harris leave her job and that her leaving was not foreseeable. (Pet. for Cert. App. A-21, A-22).

Ms. Harris filed objections to the Magistrate's Report and Recommendation. None were filed by Forklift. On February 4, 1991, the district court summarily rejected her objections, adopted the Magistrate's Report and dismissed the action.⁵ (Pet. for Cert. App. A-4).

⁵ The Magistrate's Report constitutes the district court's findings of fact and conclusions of law under Rules 52 and 53(e)(2), Fed. R. Civ. Pro., because the district court adopted the report and recommendation without modifications. Thus, reference to the magistrate in this brief is effectively reference to the district court.

The Sixth Circuit, in an unpublished opinion issued on September 17, 1992, summarily affirmed the decision of the district court. (*Id.* at A-2, A-3).

SUMMARY OF THE ARGUMENT

This case turns on whether Title VII requires a sexual harassment plaintiff to prove that he or she suffered serious psychological injury in order to establish liability for a hostile working environment. The case was tried before a magistrate, who made findings of fact in which he found that Teresa Harris was the object of a continuing pattern of derogatory sex-based conduct caused by Charles Hardy, the president of Forklift. The magistrate found that Ms. Harris was offended by Mr. Hardy's conduct and that the conduct would have offended a reasonable person in her position. The magistrate's factual findings were not objected to by the employer.

In *Meritor Savings Bank v. Vinson*, this Court held that Title VII prohibits employers from maintaining work places in which sex-based conduct is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. Even though Ms. Harris was the object of a continuing pattern of sex-based conduct that offended her and would have offended a reasonable person in her position, her hostile environment and constructive discharge claims were dismissed because the Magistrate felt that Ms. Harris had not suffered serious psychological injury.

In the Sixth Circuit, serious psychological injury is a necessary element of proof in a hostile environment claim

based on sex. This requirement does not comport with the statutory purpose of Title VII to eliminate discriminatory practices from the workplace nor is it consistent with this Court's decision in *Meritor*. The psychological injury requirement imposes upon a sexual harassment plaintiff the burden of exposing herself to offensive workplace behavior to the point that she is psychologically injured in order to make out a claim for equitable relief under Title VII.

A hostile work environment claim should be based on consideration of those facts which describe the pervasiveness or severity of the offensive sexual conduct. The conduct can then be viewed from the perspective of a reasonable person in the plaintiff's position (a reasonable victim) to determine if the conduct is so severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment. This perspective will both promote the purpose of Title VII to eliminate discriminatory workplace conduct and protect employers from sensitive employees who make unreasonable complaints about sexual conduct in the workplace. Alternatively, the victim's testimony and other proof regarding the workplace conduct can be considered without regard to any reasonableness standard.

Applying either analysis to the magistrate's factual findings requires reversal of the decisions below dismissing Ms. Harris' hostile environment claim. The magistrate's factual findings support the legal conclusion that the conduct to which Ms. Harris was exposed was both severe and pervasive and altered her working conditions. Ms. Harris' constructive discharge claim was also dismissed because of the magistrate's determination that Mr.

Hardy's behavior was "not that bad". Because dismissal of Ms. Harris' constructive discharge claim was tied directly to the dismissal of her hostile environment claim, she should be granted judgment on her constructive discharge claim as well.

ARGUMENT

I. PROOF OF SERIOUS PSYCHOLOGICAL INJURY IS NOT NECESSARY TO ESTABLISH HOSTILE ENVIRONMENT LIABILITY ON THE BASIS OF SEX UNDER TITLE VII.

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 provides that it is unlawful for an employer "... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin". 78 Stat. 253, 42 U.S.C. § 2000e-2(a)(1). In 1986, this Court in *Meritor* held that the phrase "terms, conditions or privileges" is not limited to economic or tangible discrimination, and, therefore, a hostile work environment on the basis of sex could be a violation of Title VII. In a unanimous decision, the Court announced that Title VII invests in employees the right to work in an "environment free from discriminatory intimidation, ridicule and insult." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986).

The standards established in *Meritor* for evaluating hostile environment claims on the basis of sex are whether the conduct complained of was "unwelcome"

and "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." *Meritor Savings Bank v. Vinson*, 477 U.S. at 65 (1986). Whether these standards have been met is to be based upon consideration of the totality of the circumstances. (Citing EEOC, *Guidelines on Discrimination Because of Sex*, 29 C.F.R. § 1604.11(b) (1992).)

Based on the *Meritor* totality of the circumstances test, the courts generally agree that a plaintiff is entitled to relief in a hostile environment case if five elements⁶ are established:

- (1) The employee belongs to a protected group;
- (2) The employee was subjected to unwelcomed sexual harassment, that is, sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature that is unsolicited or uninvited;
- (3) The harassment complained of was based on sex, that is, but for the fact of the employee's sex, the employee would not have been the object of the harassment;
- (4) The harassment complained of affected a term, condition, or privilege of employment, that is, the harassment created an abusive or hostile working environment; and
- (5) Respondeat superior or that the employer knew or should have known of the harassment and failed to take prompt remedial action. See *Staton v. Maries County*,

⁶ The five elements were initially enunciated by the Eleventh Circuit in *Henson v. City of Dundee*, 682 F.2d 897 (1982).

868 F.2d 996, 998 (8th Cir. 1989); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3rd Cir. 1990); *Henson v. City of Dundee*, 682 F.2d 897, 903-905 (11th Cir. 1982).

Of these five elements, there is a direct conflict among the courts of appeal on whether a plaintiff must actually suffer serious psychological injury to satisfy the fourth element requiring that the conduct create an abusive or hostile working environment.⁷

The decision of the Sixth Circuit in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987), held that actual proof of serious psychological injury is required. In that case, the Sixth Circuit determined that the test articulated in *Meritor* to establish whether harassment created a hostile working environment must be proved by conduct which:

... had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile or offensive work environment that effected seriously the psychological well-being of the plaintiff.

Id. at 619.

Based solely on *Rabidue*, the magistrate dismissed Ms. Harris' hostile environment claim. Although he found that Mr. Hardy's conduct offended Ms. Harris and would offend a reasonable woman in her position, he concluded the proof was insufficient, as a matter of law,

⁷ No issue is before the Court as to the other four elements because the magistrate found the proof to have satisfied those elements. (Pet. for Cert. App. A-17).

to establish that it had "so poisoned" the workplace at Forklift, "as to be intimidating or abusive to [Ms. Harris]" in that she had suffered serious psychological injury as a result of that conduct. (Pet. for Cert. App. A-19).

Ms. Harris submits there are at least five reasons why proof of serious psychological injury should not be required to satisfy *Meritor's* standard that charged sexual harassment is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. First, neither the language of Title VII nor its legislative history requires proof of serious psychological injury. Second, *Meritor* did not require proof of serious psychological injury. Third, *Rabidue* is based on a misinterpretation of *Meritor*. Fourth, the Equal Employment Opportunity Commission (EEOC) has rejected *Rabidue's* requirement of serious psychological injury. And finally, a rule that requires a plaintiff to have actually suffered serious psychological injury is inconsistent with the objectives of Title VII.

A. Neither the Language of Title VII nor its Legislative History Requires Proof of Serious Psychological Injury.

Title VII makes it unlawful for employers "to discriminate with respect to the terms, conditions and privileges of employment." 78 Stat. 253, 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Neither the phrase "terms, conditions, and privileges of employment" nor the term "discriminate" is defined in the Act. This Court, however, has construed the phrase "terms, conditions and privileges"

to mean the contractual relationship of employment. *Hishon v. King and Spalding*, 467 U.S. 69, 75-76 (1984).

In construing a statute it is appropriate to assume that the ordinary meaning of the language that Congress employed accurately expresses its legitimate purpose. *Daniel v. Paul*, 395 U.S. 298, 308 (1969) (the words "place of recreation" as used in the 1964 Civil Rights Act should be given their usual meaning); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 n.16 (1977) (the words "pattern and practice" as used in the 1964 Civil Rights Act are not terms of art and reflect only their usual meaning).

In Title VII, the words used by Congress, "terms, conditions and privileges," given their ordinary meaning, all relate to the employment relationship rather than the reaction an employee may have to circumstances in the workplace: the word "term" means "a limited or definite extent of time" [Webster's New Third International Dictionary, p. 2358] (1976); the word "conditions" means "something established as a requisite for doing something else" and, additionally, "attendant circumstance; the existing state of affairs" (*Id.* at 423); the word "privileges" means "a right or immunity granted as a peculiar benefit, advantage or form" (*Id.* at 1805). Each word chosen by Congress expresses an aspect of the employment relationship rather than the reaction of an employee to that relationship.

The Court has broadly construed the term "discriminate," as evincing a congressional intent to "strike at the entire spectrum" of discrimination on the basis of sex in

the employment relationship. *Meritor Savings Bank v. Vinson*, 477 U.S. at 64 (1986) (citations omitted).

The term "to discriminate" indicates that Congress intended to focus on the acts or conduct of the alleged discriminator, not the result of the discrimination or the reaction of the victim of the discrimination. As explained by the Court, discrimination simply means conduct of an employer which treats some individuals less favorably than others because of race, sex, religion, or national origin. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978) (citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335, n.15 (1977)).

The accepted meaning of these words, in the context of the purpose of Title VII to eliminate discrimination in employment, therefore, naturally leads to a consideration of conduct or behavior giving rise to the alleged workplace discrimination: in this case, those facts descriptive of the conduct alleged to constitute a sexually hostile work environment, rather than an employee's psychological reaction to the offensive conduct.

B. *Meritor* Does Not Require Proof of Serious Psychological Injury.

The test of hostile environment liability adopted by this Court in *Meritor* does not require proof of serious psychological injury by the victim of sexual harassment. *Meritor* addressed two elements of a hostile environment claim. First, conduct of a sexual nature must be unwelcome. *Meritor Savings Bank v. Vinson*, 477 U.S. at 68 (1986). Second, sexual harassment must be sufficiently

severe or pervasive to alter the conditions of the [victim's] employment and create an abusive working environment. *Id.* at 67.

The rationale for the first requirement of the test, that sexual conduct be unwelcome, is to distinguish between consensual conduct and that which is uninvited and, thereby, potentially actionable.⁸ *Id.* at 68. As defined by the Eleventh Circuit, conduct is unwelcome under Title VII if an employee "did not solicit or invite it and in the sense that the employee regarded the conduct as undesirable or offensive." *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982); accord, *Burns v. McGregor Electronic Ind., Inc.*, 61 FEP Cases (BNA) 592, 595 (8th Cir. March 30, 1993).

Whether conduct is unwelcome involves some proof that the sexual behavior was offensive but only in the sense that an employee was motivated to demonstrate that it was uninvited. *Barnes v. Costle*, 561 F.2d 983, 999 (D.C. Cir. 1972). Proof on the issue of unwelcomeness may address how the employee complaining of the sex-based workplace harassment felt about the conduct and/or how the employee voiced his or her objections to the harassment. See *Meritor Savings Bank v. Vinson*, 477 U.S. 67-69 (1986); EEOC, *Policy Guidance on Current Issues of Sexual Harassment*, (1989-91 Transfer Binder) CCH Employment Practices, ¶5258 at 6924 (March 19, 1990). This proof, in turn, will necessarily involve determination

⁸ Men and women spend a major portion of their adult lives in the workplace where sexual attraction between employees may, and does, arise. See, Barbara A. Gutek, *Sex In The Workplace*, pp. 1-4 (1985).

of whether the conduct was truly uninvited or offensive. However, as with this Court's consideration of unwelcomeness in *Meritor*, the seriousness of psychological injury, if any, suffered by a harassment victim is not a necessary element for consideration of this issue. *Meritor Savings Bank v. Vinson*, 477 U.S. at 67-69 (1986).

Similarly, the determination that conduct is severe or pervasive, does not turn on the psychological reaction the victim has to the conduct, but rather on analysis of the conduct itself. Severity or pervasiveness addresses the egregiousness of the harasser's conduct or how it infects the workplace in which the plaintiff works.⁹ In *Meritor*, conduct characterized as "criminal conduct of the most serious nature" was found actionable while the Court observed that the "mere utterance of a racial epithet" would not be considered sufficient to alter the condition of employment to create a hostile work environment. *Meritor Savings Bank v. Vinson*, 477 U.S. at 67 (1986). The severity of conduct will vary with how "bad" it is perceived to be: whether it is serious or trivial. Compare *Hall v. Gus Construction Co.*, 842 F.2d 1010 (8th Cir. 1988) (male members of road construction crew "incessantly" referred to female crew members as "fucking flag girls", "repeatedly" asked female crew members to engage in sex acts,

⁹ The words chosen by this Court to express the test for hostile environment liability direct attention to the workplace conduct rather than the degree of reaction of the victim. The word "severe" means "of a great degree or harmful or undesirable effect [Webster's New Third International Dictionary, p. 2081] (1976), while the word "pervasive" means "that which pervades or tends to pervade", the word "pervade" meaning "to become diffused throughout". (*Id.* at 1688).

"frequently" mooned female crew members, and would "rub the females' thighs and breasts") with *Morgan v. Massachusetts General Hospital*, 901 F.2d 186 (1st Cir. 1990), (Co-worker "bumped" victim, peeped at victim's "privates" in the restroom and "hung around him a lot.") However, even innocuous conduct ("a mere epithet") may become severe or pervasive as it is repeated by the perpetrator or echoed by others in the workplace. *Risinger v. Ohio Bureau of Workers Compensation*, 883 F.2d 475 (6th Cir. 1989).

The determination that conduct is severe or pervasive, however, does not turn on the psychological reaction the victim has to the conduct, but rather on an analysis of the conduct in its entirety.

C. *Rabidue* is Based on a Misinterpretation of *Meritor*.

The Sixth Circuit's requirement that, to be actionable, sexual conduct must be sufficient to and actually cause serious psychological injury results from a misinterpretation of *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) and its citation by this Court in *Meritor*. See *Meritor Savings Bank v. Vinson*, 477 U.S. at 65-66 (1986).

Reference to the psychological well-being of the victim was first mentioned by the Fifth Circuit in determining that a racially hostile work environment could be actionable under Title VII. *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). In describing the parameters of Title VII's protection, the

Fifth Circuit observed that "[o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and [I] think Section 703 of Title VII was aimed at the eradication of such noxious practices." *Id.* at 238.

Although the reference to "psychological well-being" can describe a level of severity or pervasiveness sufficient to establish hostile environment liability, it does not require, and did not require in *Rogers*, that the plaintiff must necessarily have suffered serious psychological injury. The Fifth Circuit properly recognized that offensive epithets could adversely affect the mental and emotional well-being of individuals to whom the epithets are directed. See *Mari Matsuda, Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich.L.Rev. 2320, 2336, n.84 (1989) (describing the physiological and psychological effects of racial harassment including difficulty breathing, hypertension, alcoholism, social withdrawal, chronic depression, and anxiety neuroses).

Although this Court, in *Meritor*, quoted from *Rogers*, it did not focus on psychological harm as a necessary element of proof. Rather, the Court recognized that sexual harassment could have the same consequences as other forms of harassment and, thereby, alter the employment conditions of its victim.

D. The Equal Employment Opportunity Commission Has Rejected *Rabidue's* Requirement of Serious Psychological Injury.

The EEOC issued an extensive Policy Guidance on Current Issues of Sexual Harassment in 1990. The Guidance was issued in view of this Court's decision in *Meritor* and subsequent sexual harassment decisions in the lower courts. EEOC, *Policy Guidance on Current Issues of Sexual Harassment*, (1989-91 Transfer Binder) CCH Employment Practices ¶5258 at 6921 (March 19, 1990).¹⁰

In the *Policy Guidance*, the EEOC specifically rejected the serious psychological injury requirement established in *Rabidue*. The EEOC reasoned that it should be sufficient to show that the harassment was unwelcome and would substantially affect the work environment of a reasonable person. EEOC, *Policy Guidance on Current Issues of Sexual Harassment*, (1989-91 Transfer Binder) CCH Employment practices ¶5258 at 6928, n.20 (March 19, 1990).

E. *Rabidue* is Inconsistent With the Policy Objectives of Title VII.

The *Rabidue* rule requiring that a plaintiff to have actually suffered serious psychological injury is fundamentally at odds with the policy objectives of Title VII. The primary objective is prophylactic: to achieve equality of employment and remove barriers that have operated in

¹⁰ Although not controlling, EEOC Guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort . . ." *Meritor Savings Bank v. Vinson*, 477 U.S. at 65 (1986).

the past in favor of a preferred group of employees. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971)). Stated differently, the primary purpose of Title VII is to *prevent* economic and noneconomic injuries that may result from unlawful discrimination on the basis of race, sex, religion or national origin. *Meritor* is grounded in the prophylactic objective of Title VII because the Court recognized that Title VII "affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Meritor Savings Bank v. Vinson*, 477 U.S. at 65 (1986).

Rabidue's serious psychological injury criterion is inconsistent with the prophylactic objective of Title VII because it requires a victim of sexual harassment to prove that she actually endured and suffered severe anxiety or debilitation in order to establish *liability* in a hostile environment case. Under *Meritor*, however, Title VII's prophylactic objective comes into play long before the point where victims of noneconomic discrimination require psychiatric treatment or have actually suffered anxiety or debilitation. See *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991).

The EEOC recognizes that the prophylactic objective of Title VII is particularly necessary in sexual harassment cases. As stated in its regulations,

Prevention is the best tool for elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees

of their rights to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

EEOC, *Guidelines on Discrimination Because of Sex*, 29 C.F.R. § 1604.11(f) (1992). Under the EEOC's view, the prophylactic purpose of Title VII is best served by an employer having a policy against sexual harassment, the policy being effectively communicated to all of the employees, the employer establishing an effective process through which employees affected by sexual harassment can seek redress, and the development of effective sanctions for employees found to have violated its policy against sexual harassment. EEOC, *Guidance on Current Issues of Sexual Harassment*, (1989-1991 Transfer Binder), CCH Employment Practices ¶5258 at 6936 (March 19, 1990). The courts have found that the prophylactic objective of Title VII, as found in the EEOC's regulations, imposes an affirmative duty on employers to take steps so that employees are not subjected to psychological injury as a result of sexual harassment. See *Stoehmann Bakeries v. Local 776*, 969 F.2d 1436, 1441-42 (3d Cir. 1992) (in addition to well-defined public policy against sexual harassment, there is a dominant public policy favoring voluntary employer prevention and application of sanctions against sexual harassment); *Davis v. Tri-State Mack Distributors, Inc.*, 981 F.2d 340, 343-44 (8th Cir. 1992) (failure of employer to have a policy against sexual harassment critical in finding employer liable); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989) (harassment ended after remedial action taken).

Rabidue's failure to effectuate the objectives of Title VII is forcefully illustrated in this case. Ms. Harris' unrebutted

testimony is that she was embarrassed by Mr. Hardy's conduct; she cried a great deal, she was having shortness of breath, she would get drunk every night so she could get enough sleep to go back to a work environment that was fraught with sexual intimidation, sexual ridicule, and sexual insults; she hated to go to work, and when she did, she would frequently sit in her office and shake; she suffered anxiety; she had to take tranquilizers and sleeping pills; and she was ugly to her children. (Pet. for Cert. App. A-10); (J.A. 52-53, 56). Even in the face of the devastating effects that Mr. Hardy's sexually vulgar and demeaning conduct had on the conditions under which Ms. Harris worked, the magistrate found it insufficient to satisfy the *Rabidue* serious psychological injury standard.

The *Rabidue* rule of serious psychological injury also frustrates the application of Title VII to remedy egregious sexual harassment in the workplace directed towards women. Faced with sexually abusive workplace conduct, a common reaction of women is to leave that workplace for another. Women choose to leave the workplace to avoid the disgust and degradation of sexual harassment. Barbara Gutek, *Sex In The Workplace*, 73-74 (1985). As some courts have recognized, the sexual harassment of women is, *per se*, psychologically harmful. See *Ellison v. Brady*, 824 F.2d 872, 880 n.15 (9th Cir. 1991) (quoting study of effects of sexual harassment); see also, *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1275, n.3 (7th Cir. 1991) (the harmful effects of racist speech are well documented). Leaving a workplace imbued with sexually derogatory conduct may appear to some women to be the path of least resistance. However, because those women may not have already suffered serious psychological injury at the

time they leave the workplace, the *Rabidue* rule would preclude, for them, a finding of hostile environment liability. While leaving an offensive work environment may be an appropriate means of self-protection, the effect of the *Rabidue* rule is to render such work sites immune to Title VII relief. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

Finally, the *Rabidue* rule imposes a proof requirement in the hostile environment cases that is not applicable in other Title VII claims. None of the Title VII cases decided by this Court, not involving hostile environment, have required plaintiffs to prove psychological injury to establish a violation. It is not required in cases involving the failure to hire. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 793 (1973). It is not required in the discharge cases. See *McDonald v. Sante Fe Trail Transportation Co.*, 427 U.S. 273 (1976). It is not required in the disparate impact cases. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The reason proof of serious psychological injury is not required to establish a violation in Title VII cases is that it would be contrary to the prophylactic objective of the Act, and inconsistent with the focus of Title VII on the conduct of the alleged perpetration of discrimination as discussed Argument II, *supra* 27-44. See generally, B. Glen George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U.L. Rev. 1 (1993) (Sexual harassment claims should be treated the same as other claims under Title VII.)

II. THE COURT BELOW ERRED IN DISMISSING MS. HARRIS' HOSTILE ENVIRONMENT CLAIM.

The *Meritor* test for hostile environment liability requires that the challenged conduct be evaluated with respect to its severity or pervasiveness. This Court has not addressed the manner in which evidence on severity and pervasiveness should be considered. The magistrate incorporated into his analysis below both a reasonable person standard, which Ms. Harris submits is an inappropriate basis upon which to judge hostile environment cases, and a reasonable victim standard.

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), has been interpreted by the courts of appeals to require some standard in determining whether conduct of a sexual nature is "sufficiently severe or pervasive to create an abusive working environment".¹¹ The rationale for a reasonableness standard is based on an accommodation of competing interests. The first interests are those of the employees Title VII was intended to protect. In enacting Title VII, Congress made a policy decision to eliminate, as

¹¹ The courts of appeals considering whether a work environment was sufficiently severe or pervasive to constitute an abusive working environment have generally applied an objective standard of reasonableness to consideration of the work environment. See, e.g., *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3rd Cir. 1990); *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989); *Brooms v. Regal Tube Co.*, 881 F.2d 412, 418 (7th Cir. 1989); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). But see, *Ellison v. Brady*, 924 F.2d 872, 877-78 (9th Cir. 1991) (no subjective component to analysis of environment)

a condition of employment, the requirement that individuals run a "gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living," *Meritor Savings Bank v. Vinson*, 477 U.S. at 67 (citation omitted), and to provide "employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult, *Id.* at 65 (citation omitted). The second interest is to protect employers from having to accommodate the idiosyncratic concerns of the hypersensitive employee. *Meritor Savings Bank v. Vinson*, 477 U.S. at 67 ("mere utterance of ethnic[,], racial [or sexual] epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to a sufficiently significant degree to violate Title VII) (citations omitted)); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3rd Cir. 1990); *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991).

Although the courts of appeals have applied a reasonableness standard, they disagree on the critically important issue of whose perspective should control: that of the victim or the harasser.¹² Under Ms. Harris' reading

¹² In *Rabidue*, the perspective of the harasser was characterized as a reasonable person standard. *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). Several post-*Rabidue* Sixth Circuit hostile environment cases relied on the reasonable victim perspective adopted by the dissenting judge in *Rabidue*. See *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987) (sexual harassment should be viewed from the victim's perspective); *Davis v. Monsanto Chemical Co.*, 858 F.2d 345, 350 (1988), *cert. denied*, 490 U.S. 1110 (1989) (reasonable victim standard applies in racial harassment cases). *Rabidue* is still the law in the Sixth Circuit because the panel in *Davis v. Monsanto* simply held that *Rabidue* does not apply to

of *Meritor* the appropriate "reasonableness" standard, to determine whether the harasser's conduct of a sexual nature is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment must be that of a reasonable victim in the position of the plaintiff.¹³ In making this determination courts should consider those factors which objectively describe the workplace conduct being challenged from the perspective of the reasonable victim to determine whether it is offensive. A conclusion that the conduct would be offensive to a reasonable victim will give rise to liability if it is also sufficiently severe or pervasive. In the alternative, the severity or pervasiveness of offensive conduct can be viewed from a totality of the circumstances without resorting to any reasonableness standard. Under either approach, the magistrate's findings support the conclusion that judgment should be entered for Ms. Harris.

A. The *Rabidue* Standard of Reasonableness Legitimizes Offensive Societal Stereotypes Title VII is Intended to Remedy.

In *Rabidue*, the plaintiff, a female salaried management employee, claimed that her employer had condoned

racial harassment claims, and the Sixth Circuit affirmed the decision below in this case which had applied the *Rabidue* standard. Moreover, it is well-settled in the Sixth Circuit that a latter panel cannot overrule the decision of an earlier panel on the same issue. See, e.g., *Timmreck v. United States*, 577 F.2d 372, 376 n.15 (6th Cir. 1978), *rev'd on other grounds*, 441 U.S. 780 (1979).

¹³ For ease of reference, Ms. Harris will use the term "reasonable victim". The term "victim" was inserted by this Court in its statement of the test for hostile environment liability in *Meritor Savings Bank v. Vinson*, 477 U.S. at 67 (1986).

a hostile work environment because she and other women employees were exposed daily to pictures of nude or partially clad women displayed openly by male co-workers. *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 615 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). One poster, which had remained on a wall in the workplace for eight years, showed a prone woman who had a golf ball on her breast with a man standing over her, golf club in hand, yelling "Fore." Plaintiff and other female co-workers were offended by the posters. One of plaintiff's co-managers, a male, had routinely referred to women as "whores," "cunt," "pussy," and "tits;" had called the plaintiff a "fat ass"; and had stated pointedly about the plaintiff that, "[a]ll that bitch needs is a good lay."¹⁴ *Id.* at 624 (Keith, J., dissenting). The district court ruled against plaintiff.

The Sixth Circuit, in a 2-1 decision affirming the lower court, adopted a two-pronged test of reasonableness. The first prong, or the objective prong, requires a plaintiff to prove two things: first, that conduct of a sexual nature which plaintiff claims to be offensive would affect a hypothetical reasonable person's¹⁵ work

¹⁴ "Bitch" means a lewd or immoral woman: a generalized term of abuse. Webster's Third New International Dictionary, 222 (1976) "Lay" means "to copulate". *Id.* at 1281.

¹⁵ The genderless "reasonable person" standard is a fairly recent development because, historically, the standard has been that of a "reasonable man." See generally, Ronald K. L. Collins, *Language, History and the Legal Process, A Profile of the "Reasonable Man,"* 8 Rut.-Cam. L.J. 311, 317 (1977); Nancy Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 Yale L.J. 1177 (1990).

performance; and second, that the conduct must "seriously" affect the psychological well-being of that hypothetical person. *Id.* at 620. Assuming that the first prong is satisfied, the second prong, or the subjective prong, requires the plaintiff to prove two additional facts: that she was actually offended by the conduct; and second, that she actually suffered some degree of psychological injury as a result of the conduct. *Id.* at 620.¹⁶

The Sixth Circuit test of reasonableness is based upon the culture of the prevailing work environment established well before Title VII became effective:

Indeed, it cannot be seriously disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to – or can change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment for female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.

Id. at 620-21 (citing 584 F.Supp. 419, 430 (E.D. Mich. 1984)).

Thus, the *Rabidue* culture of prevailing work environment theory of reasonableness legitimates the perspective of the harasser by virtue of the factors the Sixth Circuit

¹⁶ For the reasons set forth in *Infra* Argument I, pp. 18-19, Ms. Harris believes that proof of actual offense will be a necessary element to establish unwelcomeness criteria, but need not rise to level of serious psychological injury.

deemed relevant. These factors include, for example, whether conduct of a sexual nature was the norm in the employer's workplace prior to the employment of the plaintiff, or to use the language of the Sixth Circuit, does the evidence support a finding that a "lexicon of obscenity pervaded the environment of the workplace before and after" the plaintiff was initially employed. *Id.* at 620.¹⁷ The magistrate in this case relied upon culture of prevailing work environment factor in part, in ruling against Ms. Harris because he thought it relevant that "[m]any clerical employees tolerated his [Hardy's] behavior and, in fact, viewed it as the norm and as joking, and that several "clerical employees formerly employed [by Respondent] testified that Hardy's frequent jokes and sexual comments were just part of the joking work environment." (Pet. for Cert. App. A-17, A-18).

The culture of the prevailing work environment theory approved in *Rabidue* requires individuals to assume the risk that they would be subjected to severe or pervasive conduct of a sexual nature when the employer allowed such conduct to take place prior to the time a person is employed. Judge Keith forcefully illustrated the fundamental flaw in the majority's construction of *Meritor* when he stated that "no woman should be subjected to an environment where her sexual dignity and reasonable sensibilities are visually, verbally or physically assaulted as a matter of male prerogative." *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 626-27 (1986) (Keith, J., dissenting), cert. denied, 481 U.S. 1041 (1987).

¹⁷ The only other circuit to adopt this view is the Seventh. See *Brooms v. Regal Tube*, 881 F.2d 412 (7th Cir. 1989).

Rabidue requires employees to develop a high threshold tolerance for sexual abuse as a condition of employment because conduct of a sexual nature in the workplace is to be analyzed within the context of a larger society that "condones and publicly features and commercially exploits open displays of written and pictorial erotica at newsstands, on prime-time television, at the cinema, and in other public places." *Id.* at 622. The magistrate appears to have been substantially influenced in his ruling by this consideration because he found that female clerical employees of Forklift, but not Ms. Harris, had been "conditioned" to accept denigrating treatment (Pet. for Cert. App. A-18).

A standard of reasonableness based upon the perspective of the harasser allows a court to minimize the adverse effect that sexually derogatory conduct may have in creating a hostile environment for plaintiffs. Thus, although the majority in *Rabidue* found that the harasser in that case, Henry, was an "extremely vulgar and crude individual," the court minimized the effect on his conduct on the plaintiff by stating that the nude posters and Henry's remarks, "although annoying, were not so startling as to have affected seriously the psyches of the plaintiff and other female employees." (*Id.* at 622). Similarly, although the magistrate found Mr. Hardy, in this case, to be "a vulgar man" who "demeans the female employees at his work place (Pet. for Cert. App. A-14), he concluded that "Hardy's comments cannot be characterized as much more than annoying and insensitive" and, therefore, the conduct "was comparable to that in *Rabidue*." (Pet. for Cert. App. A-18, A-19, A-20).

Because it accepts existing offensive sexual stereotypes as the norm, the Sixth Circuit reasonable person standard fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men.¹⁸ See Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 Harv.L.Rev. 1449, 1451 (1984). It is, therefore, an inappropriate analytical tool for the application of a statute intended to eliminate artificial, arbitrary and unnecessary barriers based on sex from the workplace. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). This Court has recognized that stereotypical attitudes about women, when manifested in the workplace, are as much a condition of employment as is true of facially neutral employment practices that have an adverse effect on the employment opportunities of groups protected under Title VII. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) (plurality opinion) ("We are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group. . . ."); *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 990-91 (1988); *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 285 n.17 (1987).

B. Offensive Sexual Conduct Can Be Viewed From the Perspective of a Reasonable Person in the Position of the Plaintiff Under *Meritor*.

A standard which considers objective factors of workplace conduct from the perspective of a reasonable

¹⁸ Studies show that the harasser in the overwhelming majority of cases are males. Barbara A. Gutek, *Sex and The Workplace*, 46 (1985); Susan Estrich, *Sex At Work*, 43 Stan.L.Rev. 813 at 821, 822, n.26-28 (1991).

person in the position of the plaintiff would comport with *Meritor*. This standard appropriately accommodates the competing interests of affording employees the right to work in an environment free from discriminatory intimidation, ridicule and insult and the interest of employers to be free from liability to idiosyncratic employees. See *Meritor Savings Bank v. Vinson*, 477 U.S. at 65 (1986). Three courts of appeals and the EEOC have specifically rejected *Rabidue's* reasonable person standard and have adopted the reasonable victim perspective. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485-86 (3d Cir. 1990); *Burns v. McGregor Electronic Ind.*, FEP Cases (BNA) 592, 594 (8th Cir. March 30, 1993); *Ellison v. Brady*, 924 F.2d 872, 879-80 (9th Cir. 1991); EEOC, *Guidance on Current Issues Of Sexual Harassment*, (1989-91 Transfer Binder) CCH Employment Practices ¶5258 at 6928 (March 19, 1990).¹⁹

Ellison v. Brady, is the leading case supporting the reasonable victim standard. Plaintiff, a female and a federal revenue agent, had been invited to lunch by one of her co-workers, Gray, a male. She accepted the first invitation, but declined two others. Gray then sent her a series of bizarre notes in which he professed his romantic

¹⁹ The Third Circuit has not provided a clear answer the issue of the perspective from which sexually harassing conduct must be viewed. In *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988), the court recognized that there may be two different perspectives on the questions of welcomed and pervasiveness: the harasser's perspective and the victim's perspective. *Id.* at 898 (citing Judge Keith's dissent in *Rabidue*). But in *Morgan v. Massachusetts General Hospital*, 901 F.2d 186 (1st Cir. 1990), the court apparently ignored *Lipsett's* "two perspectives" approach and applied the *Rabidue* majority's "reasonable person" standard. *Id.* at 192-93.

interest in her. For example, one of the letters said, "I cried over you last night and I'm totally drained today." *Id.* at 874. In another note he said, in part, "I have enjoyed you so much over these past two months. Watching you. Experiencing you from o so far away." *Id.* Concerned by Gray's unwelcomed conduct, plaintiff complained to her supervisor, who temporarily sent Gray to another job site. Gray, however, continued to write the plaintiff. Ms. Ellison described one letter as "twenty times, a hundred times" weirder than previous correspondence. She became frightened by his persistence in writing her and following her. Upon learning that he would be returning to her work site, plaintiff initiated charges against her employer for not protecting her from Gray's harassment. The district court ruled against the plaintiff on the ground that she had overreacted to Gray's conduct, which it characterized as isolated and trivial. *Id.* at 876.

After closely examining *Meritor*, the Ninth Circuit reversed, holding that the severity or pervasiveness of sexually harassing conduct is to be determined from the perspective of a reasonable victim.²⁰ *Id.* at 880. The court rejected *Rabidue's* hypothetical gender-neutral reasonable person standard on the ground that it tends to systematically ignore the experience of women. Unlike the *Rabidue* reasonable person standard, which is based on a culture of the prevailing work environment, the Ninth

²⁰ The Ninth Circuit variously characterized its standard as "reasonable woman," *Id.* at 879, or "reasonable victim," *Id.* at 880. The characterizations of "reasonable man" and "reasonable woman" are used to contextualize its standard as *Meritor* instructs.

Circuit looked to the social realities, relying on studies showing the women are the primary victims of rape, *Id.* at 879, n.10, and studies documenting the realities of sexual harassment in the workplace, *Id.* at 880, n.15. Thus, in *Ellison*, the court stated that:

. . . Adopting a [reasonable] victim's perspective ensures that the courts will not sustain ingrained notions of reasonable behavior fashioned by the offender. (citation omitted) Congress did not enact Title VII to codify prevailing sexist prejudices. To the contrary, "Congress designed Title VII to prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women. (Citation omitted).

924 F.2d at 881.

In *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3rd Cir. 1990), two female police officers complained of pornographic magazines being placed in their desks and salacious, lewd and sexually foul language being directed at them and other female officers. The Third Circuit, recognizing that men and women are vulnerable in different ways to conduct of a sexual nature, observed:

Obscene language and pornography quite possibly could be regarded as highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity and without the barriers of sexual differentiation and abuse. Although men may find these actions harmless and innocent, it is highly possible that women may feel otherwise.

Id. at 1485-86. And in *Burns v. McGregor Electronic Ind.*, 61 FEP Cases (BNA) 592 (8th Cir. March 30, 1993), the Eighth

Circuit reversed a decision of the lower court on the ground that it had not applied the reasonable victim perspective in ruling against a female plaintiff in a sexual harassment case.

The reasonable victim standard is further supported by the reasoning in *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978), in which the Court, while recognizing that there are real and fictional differences between men and women, construed Title VII as prohibiting the imposition of terms and conditions of employment on "stereotyped impressions about the characteristics of males and females." *Id.* at 707 (citation omitted). Similarly, in *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), the Court upheld a state statute that required employers to grant unpaid pregnancy leave for females on the ground that the statute allows men as well as women to have families without losing their jobs.

Finally, the standard was adopted by the EEOC in 1990. In explaining its view of the reasonable person, the EEOC stated that:

The reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior. For example, the Equal Employment Opportunity Commission believes that a workplace in which sexual slurs, display of "girlie" pictures, and other offensive conduct abound can constitute a hostile work environment even if many people deem it to be harmless or insignificant. (Emphasis added); (citation omitted).

EEOC, *Policy Guidance on Current Issues of Sexual Harassment*, (1989-91 Transfer Binder), CCH Employment Practices ¶5258 at 6929 (March 19, 1990).

In evaluating hostile work environment claims, the Equal Employment Opportunity Commission suggests that the following factors, among others, be considered:

1. Whether the conduct was physical or verbal;
2. Frequency of the conduct;
3. Whether the conduct was hostile or potentially offensive;
4. Whether the harasser was a co-worker or supervisor;
5. Whether others joined in the harassing conduct; and
6. Whether the conduct was directed at more than one individual.

Id. at ¶5258 at 6928.

Similar factors have been suggested by numerous commentators. Kathryn Abrams, *Gender Discrimination and Transformation of Workplace Norms*, 42 Vand.L.Rev. 1182, 1211-13 (1989); Patricia Linenberger, *What Behavior Constitutes Sexual Harassment*, 34 Lab. L. J. 238, 246-247 (1982); see Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 Harv.L.Rev. 1449, 1458-1459 (1984).

Consideration of objective factors of sexually offensive workplace conduct from the perspective of a reasonable victim in the position of the plaintiff protects

employers from the claims of hypersensitive claimants. It is already clear from *Meritor* that sexual conduct must be considered in terms of its frequency and quality. However, it is conceivable that even "the mere utterance of an epithet" could be viewed as highly offensive by a particularly sensitive individual. Consideration of sexual conduct from the perspective of a reasonable victim would provide legal foundation for the determination that the utterance of an epithet does not alter the conditions of employment. The reasonable victim standard directs courts to consider the offensiveness of workplace conduct in the context of the interests protected by Title VII and notions of common decency.²¹ The reasonable victim perspective can also take into consideration the different experiences of men and women as victims of harassment. Nancy Ehrenreich, *Pluralist Myths and Powerless Men: The Reasonableness Standard and Sexual Harassment* 99 Yale L.J. 1177 (1990). The efficacy of this standard in resolving hostile environment claims is demonstrated by its application by at least two courts of appeals. *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Burns v. McGregor Electronic Ind.*, 61 FEP (BNA) Cases 592 (8th Cir. March 30, 1993).

²¹ Neither Charles Hardy nor a former Forklift employee, David Thompson, would allow their wives to be subjected to the behavior that Charles Hardy imposed on Ms. Harris at Forklift. (J.A. 98; J.A. 233).

C. Proof That Offensive Conduct Altered a Plaintiff's Working Conditions Can Also Satisfy the *Meritor* Test Without Resort to Any Reasonableness Standard.

The legal conclusion that an employee's working conditions have been altered by severe or pervasive sexual conduct could also be satisfied by consideration of an employee's testimony and other relevant proof regarding the offensive conduct without resorting to any reasonable person standard. Courts would still have to focus on the objective factors describing the workplace conduct and avoid consideration of those sexually offensive societal stereotypes Title VII is intended to remedy.

Such an approach would be consistent with *Meritor*, and the policy objectives of Title VII. *Meritor* requires a showing that offensive sexual workplace conduct be sufficiently severe or pervasive to alter the conditions of employment. *Meritor* neither requires any reasonableness standard nor precludes consideration of relevant proof regarding how a plaintiff perceived or felt about the workplace conduct. The trier of fact would determine whether the plaintiff's allegations that the conduct was sexually offensive are credible and, in conjunction with other proof, establish that the severity or pervasiveness test is met. The "unwelcomeness" criterion and consideration of the totality of the circumstances would filter out those claims which are insufficient to meet the test of liability.

D. Ms. Harris is Entitled to Relief on Her Hostile Environment Claim Based on the Magistrate's Factual Findings.

Applying either the perspective of a reasonable victim or the severity or pervasiveness test to the magistrate's factual findings, Ms. Harris is entitled to judgment on her hostile environment claim.

On the critical issue whether Mr. Hardy's conduct altered the conditions of Ms. Harris' employment and created an abusive working environment, the magistrate made a number of critical factual findings in her favor.²²

The magistrate found that Ms. Harris, a rental manager for Forklift, "was the object of a continuing pattern of sex-based derogatory conduct," emanating from and fostered by Mr. Hardy, and that she was "genuinely offended" by this pattern of conduct of a sexual nature. (Pet. for Cert. App. A-19).²³ The magistrate found that Mr. Hardy, Forklift's President, is a "vulgar man who demeans female employees at his workplace." (*Id.* at A-14).

Mr. Hardy's sex-based and sexual comments undermined Ms. Harris' authority as a manager, particularly so when he made "demeaning sexual comments" to Ms. Harris in front of her co-workers. (*Id.* at A-14). Mr. Hardy's comment suggesting that Ms. Harris promised

²² The magistrate found that Ms. Harris had proved each of the other elements of her hostile environment claim. (Pet. for Cert. App. A-17, A-18).

²³ See Statement of the Case, *infra*, pp. 2-10 for a complete recitation of the magistrate's factual findings and evidence in the record which support those findings.

sexual favors to a customer in order to secure an account was "truly gross and offensive." (*Id.* at A-19).²⁴

Ms. Harris' undisputed testimony was that, as a result of Hardy's conduct, she experienced anxiety, was emotionally upset, cried frequently, began drinking heavily, and her relationship with her children became strained. (*Id.* at A-10). She hated going to work and when at work would sit in her office and shake. (J.A. 53).

Forklift had no sexual harassment policy in effect during the time of Ms. Harris' employment. (J.A. 23). Ms. Harris met with Mr. Hardy in August, 1987, to confront him about his sexually abusive conduct. She intended to resign at that time but did not do so after Mr. Hardy apologized and promised Ms. Harris that his offensive conduct would stop. (Pet. for Cert. App. A-10); (J.A. 57-58). Shortly after the August meeting, however, Mr. Hardy's sexually offensive comments resumed. It was after Mr. Hardy promised to stop his offensive behavior that he made the "truly gross and offensive" remark to the effect that Ms. Harris had promised sexual favors to a customer in order to secure an account. (*Id.* at A-10). At that moment, Ms. Harris knew that Mr. Hardy would not change and his behavior would not stop. The only way she could escape his offensive conduct was to leave her employment. The magistrate's factual findings, when considered in their totality, mean that Ms. Harris had convinced the factfinder that a reasonable person in the

²⁴ For some unexplained reason, the magistrate believed that this offensive comment, made in the presence of Ms. Harris' co-workers, was less significant since it was not made in the presence of a customer. (Pet. for Cert. App. A-19).

position of the plaintiff would have been offended by Mr. Hardy's conduct and that she had been offended by Mr. Hardy's conduct.

Not all the comments and actions of Mr. Hardy directed towards women at Forklift, generally, and at Ms. Harris, in particular, were "truly gross and offensive". However, Mr. Hardy's conduct must be looked at in total, not in piecemeal fashion. *Vance v. Southern Bell Telephone Telegraph*, 863 F.2d 1503, 1504 (11th Cir. 1989). In addition, the comments and conduct should be evaluated in terms of their frequency and offensiveness. *See, Davis v. Monsanto Chemical Co.*, 858 F.2d 345 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989).

The magistrate's findings support the conclusion that Mr. Hardy's conduct was both severe and pervasive and altered the conditions of Ms. Harris' employment. Forklift imposed upon Ms. Harris as a condition of her employment, that she be subjected to a continuing pattern of derogatory sex-based conduct emanating from and fostered by Mr. Hardy. The conditions under which Ms. Harris had to work were precisely those condemned by the court in *Mentor*: Ms. Harris had to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living". *Meritor Savings Bank v. Vinson*, 477 U.S. at 67 (1986), quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982). Because the factual findings of the magistrate support the conclusion that Mr. Hardy's conduct altered Ms. Harris' working conditions and created an abusive sexual environment, under either the reasonable victim standard or the severe and pervasive standard, the decision below dismissing her hostile environment claim should be reversed.

III. THE LOWER COURT ERRED IN REJECTING MS. HARRIS' CONSTRUCTIVE DISCHARGE CLAIM.

Ms. Harris also sought relief under the constructive discharge theory. (J.A. 20). The magistrate rejected her claim on two grounds. First, he held that *Rabidue* was controlling on the constructive discharge claim. Under the magistrate's view, proof of serious psychological injury was necessary to support a claim of constructive discharge. Because he had ruled that Ms. Harris had not suffered serious psychological injury he dismissed her constructive discharge claim. (Pet. for Cert. App. A-21). Second, the magistrate relied upon a line of Sixth Circuit decisions, see *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987) (collecting Sixth Circuit cases), holding that an employee seeking relief in a constructive discharge in a hostile environment case must show that a reasonable person in the position of the plaintiff found conditions so intolerable or unpleasant that she would feel compelled to quit (Pet. for Cert. at A-21). *Yates* also requires that the following additional elements be proven beyond a finding of unlawful discrimination: (1) aggravating factors; (2) intentional conduct on the part of the employer; and (3) foreseeability by the employer that its conduct would cause a reasonable person to terminate the employment relationship. *Yates v. Avco Corp.*, 819 F.2d at 637 (6th Cir. 1987). Because the magistrate concluded that Mr. Hardy's conduct was merely annoying, his resumption of the offensive conduct neither reflected Forklift's intent to force Ms. Harris to quit, nor was it foreseeable she would quit upon resumption of the conduct. (Pet. for Cert. App. A-21, A-22).

The magistrate's dismissal of Ms. Harris' constructive discharge claim should be reversed for several reasons. First, to the extent the magistrate found that *Rabidue* was dispositive of Ms. Harris' constructive discharge claim, his dismissal should be reversed for the reasons stated in Arguments I and II, *supra*, pp. 12-44. Second, the *Yates* elements (aggravating factors, intent, and foreseeability) are not appropriate in hostile environment cases.²⁵

The principal error committed by the magistrate was his failure to comprehend the relationship between the quid pro quo and hostile environment theories of sexual harassment. A hostile environment claim also supports a quid pro quo claim if conduct of a sexual nature becomes so intolerable that a reasonable person in the position of the plaintiff would feel compelled to quit. The inquiry of whether conditions were intolerable, however, should not focus on the severity or pervasiveness of the conduct: that issue has already been determined through a finding of liability on the underlying hostile environment claim.

²⁵ Decisions from other circuits reflect similar confusion regarding constructive discharge liability in hostile environment cases. Some circuits focus on the employee's state of mind; that is, whether the hostile conditions were so intolerable to require the employee to leave. *Vaughn v. Pool Offshore Oil*, 863 F.2d 922, 926 (5th Cir. 1982); *Huddleston v. Roger Dean Chevrolet* 845 F.2d 900, 905 (11th Cir. 1988). At least one circuit focuses on the intent of the employer in the context of the remedy offered. *Paroline v. Unisys Corp.* 878 F.2d 100, 108 (4th Cir. 1990). The development of the constructive discharge theory in Title VII jurisprudence is discussed in Note, *Choosing A Standard for Constructive Discharge in Title VII Litigation*, 71 Cornell L. Rev. 587 (1986).

Harassment becomes "intolerable" if there is no end in sight: if there is no reason to believe it will ever cease. The EEOC has taken the position that if an employee leaves employment due to a hostile work environment and the employer did not have a sexual harassment policy and an effective internal grievance procedure the claim will also become one of quid pro quo. EEOC, *Policy Guidance on Current Issues of Sexual Harassment*, (1989-91 Transfer Binder), CCH Employment Practices ¶5258 at 6931 (March 19, 1990). The failure of an employer to have an effective internal grievance procedure means that it would be reasonable for a sexually harassed employee to choose to quit rather than endure the continuing harassment which has altered the conditions of her employment. *Id.* at 6931, 6934; see *Wheeler v. Southland Corp.*, 875 F.2d 1246 (6th Cir. 1989) (reasonable for employee to quit when not informed of employer's remedy to hostile environment).

The test for a constructive discharge claim, after a sexually hostile work environment has been found, should, therefore, focus on the internal remedies available to the employee which would eliminate the offensive conduct. The first inquiry should be whether the employer has an established company policy proscribing sexual harassment and an effective grievance procedure for sexually harassed employees. If there is not an effective policy or procedure, constructive discharge should be found. If there is a policy or procedure, the next inquiry should be whether the employee made use of the procedure. If the employee did not make use of the procedure, constructive discharge should not be found. Unless the employee attempts to make use of an available

remedy, the coercive element of quid pro quo harassment is lacking. See *Brown v. Regal Tube*, 881 F.2d 412, 423 (7th Cir. 1989) (employee must seek redress). If the employee made use of the procedure, the final inquiry should be whether the employer made a legitimate effort to eliminate the harassment. See *Paroline v. Unisys Corp.*, 879 F.2d 100, 109 (4th Cir. 1989) (remedy must correct hostile environment). Of course, the employee can challenge the remedy as pretextual or ineffective. This test for constructive discharge liability comports with Title VII's objective to eliminate discriminatory practices in the workplace.

The requirements for constructive discharge liability in *Yates*, on the other hand, impose unwieldy inquiries into the employer's intent and the foreseeability of the employee leaving the workplace. These requirements do nothing to foster the elimination of sexually offensive conduct in the workplace.

The relationship between quid pro quo and hostile environment claim and the application of the proposed test for constructive discharge liability is aptly illustrated in this case. The magistrate found that Mr. Hardy had engaged in vulgar and demeaning conduct of a sexual nature toward female employees, and specifically, Ms. Harris. Forklift had no sexual harassment policy or established grievance mechanism. Ms. Harris, who was offended by the conduct, confronted Mr. Hardy in August, 1987 with the intention of terminating the employment relationship. She had made the decision to terminate her employment because Mr. Hardy's conduct had altered the conditions of her employment such that she hated to come to work. After Mr. Hardy apologized and promised to stop, Ms. Harris did not resign as she

had intended, based on his assurance. However, when Mr. Hardy again began to engage in similar conduct, it became clear to her that submission to sexually vulgar and demeaning conduct would continue to be a condition of employment. She, therefore, felt compelled to terminate the employment relationship. Absent any formal policy, Teresa Harris took the initiative to speak with her boss who was also the perpetrator of the conduct of which she was complaining. Mr. Hardy and Ms. Harris spoke about her complaint and Mr. Hardy offered a remedy: he said he would stop; a remedy which would have been satisfactory to Teresa Harris. However, the remedy was illusory because the harassment continued. Faced with an ineffective remedy, Teresa Harris had no choice but to leave her employment and, thereby, lost a tangible economic benefit.

Because the dismissal of Ms. Harris' hostile environment claim was based on the application of the wrong legal standard, the decision below dismissing Ms. Harris' constructive discharge theory should also be reversed.

CONCLUSION AND PRAYER

For reasons stated above, the judgment below should be reversed. Proof of serious psychological injury is not required to conclude that a hostile environment based on sex exists. To require such proof is contrary to the remedial purposes of Title VII. Sexual conduct in the workplace, which is severe or pervasive, violates Title VII if it would be offensive to a reasonable victim or is supported by credible proof of severity and pervasiveness without

any consideration of reasonableness. The court below made adequate factual findings to conclude that the conduct Ms. Harris endured at Forklift was sufficiently pervasive or severe to alter the conditions of her employment and create an abusive work environment. The factual findings of the magistrate and undisputed facts below also support Ms. Harris' claim that she was constructively discharged.

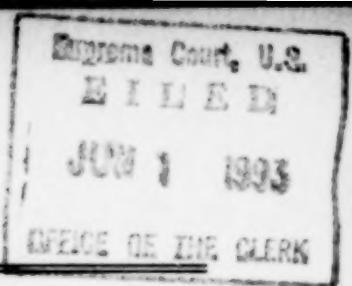
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No. 92-1168



In The
Supreme Court of the United States
October Term, 1992

TERESA HARRIS,

Petitioner,

v.

FORKLIFT SYSTEMS, INC.,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

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No. 92-1168

In The
Supreme Court of the United States
October Term, 1992

TERESA HARRIS,

Petitioner,

v.

FORKLIFT SYSTEMS, INC.,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

The magistrate in this case based his decision to dismiss petitioner's hostile environment and constructive discharge claims only in part on the findings of fact set forth by petitioner in her Statement of the Case. In addition, he based his decision on a number of facts, drawn mostly from petitioner's own testimony and proof, that persuaded him that even if Hardy's conduct was offensive, it was not "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an

abusive working environment.' " *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (alteration in original). Specifically, drawing on the facts set forth below, the magistrate found that Mr. Hardy's conduct would not have interfered with the work performance of a reasonable woman manager. Petition for Writ of Certiorari ("Cert. Pet.") at A-34. This finding forms an independent basis for the magistrate's decision. Accordingly, there is no legal issue in this case that the Court needs to resolve.

During the years she worked at Forklift Systems, Inc. ("Forklift" or "the Company"), petitioner fit into the atmosphere at the Company and enjoyed a good working relationship with Mr. Hardy and other employees. *Id.* at A-17-18, 34-35. She was the only woman who participated in regular, voluntary after-work gatherings in the office, and at these gatherings she drank beer, joked and used coarse language in the presence of Mr. Hardy and other co-workers. *Id.* at A-18, 34; (Joint Appendix ("J.A.") at 72.) Petitioner and her husband also enjoyed a social relationship with Mr. Hardy and his wife during this time period, Cert. Pet. at A-17, 34, and petitioner's husband and Mr. Hardy were in business together, *id.* at A-20.

Petitioner worked at Forklift for over two years before complaining about Mr. Hardy's conduct. *Id.* at A-17, 25-26, 35. She first complained in a meeting with Mr. Hardy on August 18, 1987, which she taped without Mr. Hardy's knowledge. *Id.* In that conversation, Mr. Hardy made it clear he did not know that petitioner was offended by his conduct or that she viewed his conduct as anything other than joking. *Id.* at A-25-26. None of the other female employees at Forklift found Mr. Hardy's

behavior to be offensive or felt that there was a hostile work environment at Forklift. *Id.* at A-25.

Petitioner asserted other reasons for her dissatisfaction with the way she was treated by Forklift. She alleged that she was discriminated against with respect to her salary, the quality of her annual review, her car allowance and her bonus. *Id.* at A-40. In her secretly taped conversation with Mr. Hardy on August 18, 1987, she cited these complaints as a significant reason for her dissatisfaction with Forklift. (J.A. at 78-79, 92-94.) The magistrate found these complaints to be without merit. Cert. Pet. at A-40-45.

The magistrate found another reason for petitioner to be dissatisfied with Forklift. At approximately the same time she decided to leave Forklift, the business relationship between Mr. Hardy and petitioner's husband fell apart. The magistrate observed:

I am certain that Hardy's business relationship with plaintiff's husband played more of a role in plaintiff's dissatisfaction with her job than plaintiff admitted. Business relationships rarely deteriorate just like that, especially between social friends and in light of Hardy's financial interest in Cellular Power. It must have been a financial blow to Cellular Power to lose the Forklift account, and I do not doubt that plaintiff had some bitter feelings towards Hardy over this.

Id. at A-22-23.

On August 18, 1987, when petitioner did complain to Mr. Hardy about his conduct, Mr. Hardy responded

favorably, apologized and promised to change his behavior. *Id.* at A-16. According to petitioner's own testimony, in the weeks following that meeting Mr. Hardy did in fact stop making the comments to which petitioner had objected. Approximately one month after he apologized and stopped making those comments, he uttered the "bugger" remark. (J.A. at 58.) Petitioner testified that it was in response to this one statement that she decided to quit her job at Forklift. (*Id.* at 59.)

The magistrate also examined Mr. Hardy's conduct for its severity. He found that, overall, Mr. Hardy's "comments cannot be characterized as much more than annoying and insensitive." Cert. Pet. at A-31. Reviewing his comments more specifically, the magistrate found that most of his comments regarding females' clothes and anatomy "were merely inane and adolescent." *Id.* at A-32. Other comments were "more objectionable," and one comment was "truly gross and offensive." *Id.* at A-33. The magistrate also found "plaintiff tried to get far too much mileage out of" the "Holiday Inn" comment, because "[p]laintiff took the comment as a joke at the time" *Id.* at A-32-33.

Based on his assessment of the severity of the conduct and the totality of the circumstances surrounding petitioner's employment at Forklift Systems, the magistrate made an ultimate determination that "plaintiff was not able to prove that Hardy's conduct was so severe as to create a hostile work environment for plaintiff at Forklift." *Id.* at A-26. In making this determination, the magistrate found that petitioner could not prevail under any of the tests used by the courts of appeal to identify a hostile work environment.

First, the magistrate determined that Mr. Hardy's comments were not "so severe as to be expected to seriously affect plaintiff's psychological well-being." *Id.* at A-34. Next, the magistrate found that "[a] reasonable woman manager under like circumstances would have been offended by Hardy, but his conduct would not have risen to the level of interfering with that person's work performance." *Id.* He also found that plaintiff was not "subjectively so offended that she suffered injury, despite her testimony to the contrary." *Id.* Finally, the magistrate found that "[a]lthough Hardy may at times have genuinely offended plaintiff, I do not believe that he created a working environment so poisoned as to be intimidating or abusive to plaintiff." *Id.* at A-35. These findings represent the magistrate's assessment that the allegedly harassing conduct was not sufficiently severe or pervasive to alter the conditions of petitioner's employment and create an abusive working environment – the correct analysis under *Meritor*.

SUMMARY OF ARGUMENT

Petitioner presents this case as a referendum on the "psychological injury" test of *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 619 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987). That test and the "interference with work performance" test are the two approaches adopted by the courts of appeal to determine whether, in the words of *Meritor*, conduct is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor Sav.*

Bank v. Vinson, 477 U.S. 57, 67 (1986) (alteration in original). At bottom, petitioner and her amici are challenging the rule of *Rabidue* that a hostile environment plaintiff must show *both* psychological injury *and* interference with work performance to prevail.

Respondent concurs that requiring a plaintiff to meet both tests to make out a case of environmental harassment is unwarranted. But a careful reading of the magistrate's opinion reveals that this case does *not* turn on application of the serious psychological injury test of *Rabidue*. A determination by this Court that *Rabidue*'s serious psychological injury requirement is not an essential element of a hostile environment case would nonetheless leave intact the finding of the court below that petitioner failed to establish a Title VII violation.

The magistrate applied the *Meritor* standard correctly by carefully examining whether the conduct at issue altered the conditions of petitioner's employment and created an abusive working environment. In determining that petitioner did not meet this standard, the magistrate made four separate findings. First, he determined that petitioner failed to show that the conduct was so severe as to be expected to affect her psychological well-being. Next, he found that the conduct, although offensive, would not have interfered with a reasonable woman manager's work performance. Thus, the magistrate found that petitioner could satisfy *neither* of the two tests used separately or together by the courts of appeal. The magistrate went on to determine that petitioner suffered no injury of any kind as a result of the conduct. Finally, he found that the conduct at issue did not create a work

environment so poisonous as to be intimidating or abusive to petitioner.

Petitioner proposes an alternative standard – mere offensiveness – that would subvert *Meritor* by rejecting any inquiry into how conduct affects employment conditions. This position does not comport with the language and purpose of Title VII and has not been endorsed by any of the courts of appeal or by the EEOC.

Because the magistrate in this case properly applied *Meritor*, he committed no legal error, and thus the decision below should be affirmed.

ARGUMENT

I. The Magistrate and Court Below Correctly Ruled That a Title VII Hostile Environment Plaintiff Must Show That the Challenged Conduct Altered the Terms, Conditions or Privileges of Her Employment

A. *Meritor Savings Bank v. Vinson* Sets Forth the Proper Standard To Ascertain Whether Sexual Harassment Is Actionable: Whether the Harassment Was Sufficiently Severe or Pervasive To Alter the Conditions of the Victim's Employment and Create an Abusive Working Environment

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1988), was enacted to prohibit discrimination in employment. Congress made it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" 42 U.S.C. § 2000e-2(a)(1) (1988). Seven years ago, this Court recognized that unwelcome sexual harassment that creates a hostile or abusive workplace atmosphere may give rise to a claim of sex discrimination under Title VII. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986).¹

¹ Courts have recognized different forms of sexual harassment: in "*quid pro quo*" cases, an employer conditions employment benefits on sexual favors; in "hostile environment" cases, sexual discrimination creates a hostile or abusive work environment. This case, like *Meritor*, is based on a hostile environment claim.

The *Meritor* Court set a clear standard to be used in Title VII sexual harassment hostile environment cases: "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* at 67 (alteration in original) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). No party in this case has suggested that the *Meritor* standard is incorrect.

Meritor makes clear that Title VII is violated only when there is a demonstrable effect on the conditions of an individual's employment. The purpose of Title VII is to ensure equal employment opportunity; the statute regulates employment practices only when those practices are sufficiently severe or pervasive to discriminate against an employee regarding the terms, conditions or privileges of employment. *Meritor*, 477 U.S. at 67; EEOC Br. at 9 ("[E]qual employment opportunity concerns . . . are central to Title VII."). As the EEOC explained in its amicus brief in support of petitioner, "Hostile environment sexual harassment is actionable under Title VII precisely because, and only to the extent that, it substantially affects those terms, conditions, or privileges." EEOC Br. at 17-18.² Therefore, offensive conduct is sufficiently

² Petitioner cites with approval the EEOC's *Policy Guidance on Sexual Harassment* stating, "The EEOC reasoned it should be sufficient for a Title VII sexual harassment hostile environment plaintiff to show that the harassment was unwelcome and would substantially affect the work environment of a reasonable person." Pet'r Br. at 22 (citing EEOC, *Policy Guidance on Sexual Harassment*, Lab. Rel. Rep. (BNA) 405:6681, 405:6690 n.20 (Mar. 19, 1990) [hereinafter "*EEOC Policy Guidance*"]).

severe or pervasive to establish a violation of Title VII only if it would alter the employment conditions of a reasonable person in the position of the plaintiff and create an abusive environment. *See Meritor*, 477 U.S. at 67. Of course, the plaintiff must also show that the conduct did in fact alter the conditions of her employment.³ Only

³ Title VII prohibits discrimination "against any individual . . .," 42 U.S.C. § 2000e-2(a)(1) (emphasis added), and it is essential that the plaintiff herself demonstrate some injury occasioned by discrimination alleged. *See Connecticut v. Teal*, 457 U.S. 440, 453-54 (1982) ("The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole."). As the Third Circuit explained, "The subjective factor is crucial, because it demonstrates that the alleged conduct injured this particular plaintiff giving her a claim for judicial relief." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990). All other circuit courts agree with this proposition. *Burns v. McGregor Elec. Indus., Inc.*, 955 F.2d 559, 566 (8th Cir. 1992) ("whether [plaintiff] was at least as affected [by the allegedly harassing conduct] as the reasonable person under like circumstances"); *Ellison v. Brady*, 924 F.2d 872, 875-76 (9th Cir. 1991) ("that the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment"); *Brooms v. Regal Tube Co.*, 881 F.2d 412, 419 (7th Cir. 1989) ("Only if the court concludes that the conduct would adversely affect the work performance and the well-being of both a reasonable person and the particular plaintiff bringing the action may it find that the defendant has violated the plaintiff's rights under Title VII."); *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989) ("To succeed on a hostile environment claim, the plaintiff must first demonstrate that the harassment interfered with her ability to perform her work or significantly affected her psychological well-being."), *aff'd in part, rev'd in part*, 900 F.2d 27 (4th Cir. 1990). A requirement of personal impact is consistent with this Court's requirement that a plaintiff "must show that he personally has suffered some actual or threatened injury as a

when plaintiff can show such an adverse effect on her employment conditions does the conduct reach the level where it denies what Title VII guarantees -- equal employment opportunity.⁴ *See EEOC Br.* at 17-18.

B. The Magistrate in This Case Correctly Applied *Meritor's* "Altered Conditions" Standard by Finding That the Conduct Did Not Interfere with Petitioner's Ability To Perform Her Job

Lower courts have employed two basic tests to determine whether conduct meets *Meritor's* altered conditions standard: "interference with work performance" and "psychological injury." Some courts apply only one of these two tests. The Ninth Circuit requires only that the plaintiff show that the conduct "unreasonably interfere[d] with work performance" *Ellison v. Brady*, 924

result of the putatively illegal conduct of the defendant," in order to gain standing. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). *See also, Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) ("whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers . . . ") (emphasis supplied by the Court) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Even where the Court has granted standing to third parties based on injuries suffered by others, a plaintiff must demonstrate "[t]hat [she] has suffered a concrete redressable injury" *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2087 (1991) (granting standing to litigant to raise a juror's equal protection claim of racial bias in jury selection process).

⁴ To avoid the cumbersome use of both masculine and feminine pronouns, this brief will refer to Title VII plaintiffs who allege sexual harassment as female. Of course, men may also claim to be victims of sexual harassment.

F.2d 872, 878 n.8 (9th Cir. 1991). The Eleventh and Third Circuits focus not on work performance, but instead on the plaintiff's psychological state, requiring that the plaintiff show, respectively, an adverse effect on her " 'psychological well being' " and her " 'psychological stability.' " *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1561 (11th Cir. 1987) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990) (quoting *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1510 (11th Cir. 1989)).

Other courts find a violation if either test is satisfied. The Fourth Circuit combines the two requirements, mandating that the plaintiff show *either* that the conduct interfered with her ability to perform work *or* adversely affected her psychological well-being. *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989), *aff'd in part, rev'd in part*, 900 F.2d 27 (4th Cir. 1990).

Two courts require both tests to be met. The Sixth and Seventh Circuits require the plaintiff to show that the harassment both interfered with her work performance *and* had a serious effect on her psychological well-being. *Brooms v. Regal Tube Co.*, 881 F.2d 412, 418-19 (7th Cir. 1989); *Rabidue*, 805 F.2d at 619.

Most of petitioner's amici, including the EEOC, agree that interference with work performance is the principal test for determining whether a hostile environment exists.⁵ The EEOC states that "[t]he standard that we urge

⁵ Like the EEOC and other amici, respondent interprets the phrase "interference with work performance" broadly to

[is] whether the objectionable conduct would affect a reasonable victim's performance of the job " EEOC Br. at 9.⁶ See ACLU Br. at 6 (Reasonable person in plaintiff's position must be "significantly hindered in her job performance *or* significantly and adversely affected in her mental, emotional or physical well-being "); Feminists for Free Expression Br. at 9 ("substantially hindered the plaintiff's job performance"); National Conference of Women's Bar Associations Br. at 10 (interference with victim's ability to do her job).

Petitioner and her amici similarly do not dispute that an alternative way for a plaintiff to establish that a hostile work environment exists is to demonstrate that she has suffered psychological injury.⁷ The EEOC and other amici insist strenuously, however, that once a plaintiff has demonstrated interference with her ability to perform her job,

include conduct creating an environment that "hampers [an employee's] opportunity to succeed vis-a-vis her male peers or denies her credit for her achievements." EEOC Br. at 25.

⁶ "Objectionable conduct is sufficiently severe or pervasive if it would interfere with a reasonable person's ability to perform the job." EEOC Br. at 9-10; see also *id.* at 12 ("objectionable conduct that would interfere with the job performance of a reasonable person who is subjected to that conduct"); *id.* at 8 (Harassment must "interfere with the job performance of a reasonable person who is subjected to that conduct.").

⁷ See EEOC Br. at 22 n. 13 ("[A] plaintiff could conceivably use [proof of psychological harm or emotional distress] as evidence that the offensive conduct would interfere with the job performance of a reasonable person."); Pet'r Br. at 21 (" '[P]sychological well-being' can describe a level of severity or pervasiveness sufficient to establish hostile environment liability ") (emphasis added).

she need not *also* prove additional serious psychological injury.

Respondent agrees with the EEOC that serious psychological harm may be a *sufficient* basis for establishing a hostile environment claim, but it is not a *necessary* basis. EEOC Br. at 22 n.13. Rejecting the *Rabidue* rule, however, would provide no basis for the relief petitioner seeks from this Court. The fact remains that in this case the magistrate independently applied both the "interference with work performance" and "psychological injury" tests, and found as a matter of fact that petitioner had satisfied neither test. Specifically, the magistrate expressly found that "[a] reasonable woman manager under like circumstances would have been offended by Hardy, but his conduct would not have risen to the level of interfering with that person's work performance." Cert. Pet. at A-34. The propriety of this finding is not undercut by his separate finding that petitioner failed to demonstrate any likelihood of psychological injury, under the second prong of the *Rabidue* test. Thus, the magistrate unquestionably applied the correct legal standard to this case.

In short, petitioner's assault on the "serious psychological harm" requirement of *Rabidue* is simply immaterial to the resolution of this case. Significantly, this is *not* a case where the lower court found that the conduct in question interfered with the plaintiff's work performance, but nonetheless found the conduct lawful under Title VII because there was no showing of serious psychological harm. Notwithstanding the efforts of petitioner and amici to suggest otherwise, the question upon which certiorari was granted does not bear on the proper

resolution of this case and affords no basis for reversing the judgment of the lower court.⁸

Moreover, a remand to the district court to affirm yet again that respondent did not unreasonably interfere with petitioner's ability to work would be purposeless. This Court will affirm the judgments of lower courts if alternative legal grounds support the initial judgment. E.g., *Miller v. Brooklyn Life Ins. Co.*, 79 U.S. (12 Wall.) 285 (1870) (affirming lower court's decision because of independent factual grounds for decision); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 652 n.11 (1990) (no need to address allegedly erroneous finding when independent, non-erroneous finding supports decision). Because the lower court here conducted the correct legal inquiry into whether petitioner's work performance was adversely affected, the decision may be reversed only if it is found to be "clearly erroneous." Fed. R. Civ. P. 52(a). As is explained below, no such finding of clear error can be made here. Rather, since the magistrate's "account of the evidence is plausible in light of the record viewed in its entirety," it must be affirmed. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) (affirming trial court's finding of no discrimination).

⁸ Because interference with work performance forms an independent unchallenged basis for the lower court's decision, respondent respectfully submits that the Writ of Certiorari was improvidently granted, and that the writ should therefore be dismissed. See *Belcher v. Stengel*, 429 U.S. 118, 119 (1976) (dismissing writ as improvidently granted because "it appears that the question framed in the petition for certiorari is not in fact presented by the record now before us" after noting that independent factual grounds supported the lower court's decision).

1. The Magistrate Did Not Rely Exclusively on *Rabidue's* Psychological Injury Test

The magistrate found that "plaintiff was not able to prove that Hardy's conduct was so severe as to create a hostile work environment for plaintiff at Forklift." Cert. Pet. at A-26. To arrive at this conclusion, the magistrate carefully evaluated the effect of the alleged harassment on petitioner and her work environment and made four *separate* findings:

- Hardy's conduct would not have interfered with a reasonable woman manager's work performance;
- Hardy's conduct was not so severe as to be expected to seriously affect petitioner's psychological well-being;
- Petitioner suffered no injury as a result of Hardy's conduct; and
- Hardy did not create a working environment so poisoned as to be intimidating or abusive to petitioner.

Id. at A-34-35.

First, the magistrate expressly found that Hardy's conduct "would not have risen to the level of interfering with [a reasonable woman manager's] work performance." *Id.* at A-34. The magistrate thus applied the standard advocated by the EEOC and several amici. This objective determination forms an independent basis for the magistrate's decision and requires that the lower court's decision in this case be affirmed.

Second, as suggested by *Rabidue*, the magistrate used psychological injury as a separate basis to assess whether the conduct was "sufficiently severe or pervasive" to create a hostile work environment. Based on his view of the demeanor and credibility of the witnesses, the magistrate determined that Mr. Hardy's conduct was not "so severe as to be expected to seriously affect plaintiff's psychological well-being." Cert. Pet. at A-34 (emphasis added). Significantly, the magistrate did not consider whether petitioner had experienced "actual psychological harm," the test that petitioner and her amici decry so vigorously. See Pet'r Br. at 23. Instead, by using the future subjunctive, the magistrate indicated that he was considering the likely or possible psychological impact of the alleged harassment, and not, as petitioner argues, requiring her to actually suffer serious psychological injury. In fact, neither the court below nor other district courts in the Sixth Circuit apply the psychological harm test in a way that forces plaintiffs to have already suffered psychological injury.⁹

Moreover, the magistrate's decision does not indicate that the psychological injury test received any particular emphasis or weight. In fact, respondent twice moved for dismissal of petitioner's case for failure to present testimony that would support a finding of "severe psychological harm," once at the close of petitioner's case, (J.A.

⁹ See also *Prichard v. Ledford*, 767 F. Supp. 1425, 1428 (E.D. Tenn. 1990) (violation of Title VII found despite apparent lack of testimony regarding psychological injury where evidence showed interference with work and conduct "would have interfered with the psychological well-being of a reasonable employee"), *aff'd*, 927 F.2d 605 (6th Cir. 1991).

at 136-37), and again at the close of respondent's case, (*id.* at 244). By rejecting both of these motions and proceeding to address the case on its merits, the magistrate demonstrated that he did not regard psychological injury as a decisive issue in this case.

Third, the magistrate found that petitioner did not suffer *any* injury as a result of the alleged harassment. Cert. Pet. at A-34. Fourth, he found that the alleged harassment did not "create[] a working environment so poisoned as to be intimidating or abusive to plaintiff." *Id.* at A-35. This last finding comports with *Meritor's* requirement to evaluate the impact of the conduct on the work environment and is a further independent basis for the magistrate's ultimate determination.

In addition to these inquiries into the effect of Hardy's conduct, the magistrate went through a process similar to the one petitioner advocates and evaluated the alleged harassment for its "offensiveness." See Pet'r Br. at 19-20. The magistrate took care to categorize some of Hardy's conduct as "merely inane and adolescent," some as evidencing a "bad sense of humor," some as "more objectionable," and in one instance only, as "truly gross and offensive." Cert. Pet. at A-32-33. Only after considering the relative offensiveness of all of the conduct, taken together with the "totality of the circumstances" surrounding petitioner's employment at Forklift Systems, did the magistrate find that petitioner had not been subjected to a hostile work environment. Thus, the magistrate in this case determined from the totality of the circumstances that Mr. Hardy's conduct was not sufficiently severe or pervasive to state a claim under *Meritor*.

In respondent's view petitioner is correct in contending that an absolute requirement of psychological injury is unjustified. The outcome in this case however in no way depends on the magistrate's use of a psychological injury test. Indeed, if every reference to psychological injury were expunged from the magistrate's opinion, no grounds would exist to reverse his decision. His three alternative findings, and in particular his finding that the alleged harassment would not have interfered with a reasonable woman manager's work performance, constitute an independent and proper basis for his decision. Therefore, the lower court should be affirmed.

2. The Magistrate's Decision Rests on Findings of Fact That Are Not Clearly Erroneous

Supporting the magistrate's finding that there was no discrimination in violation of Title VII was a great deal of testimony, much of it from petitioner herself, that convinced the magistrate that no hostile environment existed at Forklift. As this Court noted in *Meritor*, 477 U.S. at 68, determining whether conduct creates a hostile environment is an intensely factual inquiry, and determining whether a hostile environment exists is a finding of fact. *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 961 (8th Cir. 1993). Such a factual finding may be reversed by this Court only if it is "clearly erroneous." Fed. R. Civ. P. 52(a); *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) ("[A] finding of intentional discrimination is a finding of fact . . ."). In *Anderson*, this Court stated: "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the

entire evidence is left with the definite and firm conviction that a mistake has been committed.' " 470 U.S. at 573 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). The Court went on to note:

If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Id. at 573-74. Accordingly, the magistrate's determinations of fact, particularly as they relate to credibility, deserve the utmost deference.

Although the magistrate considered this a "close case," Cert. Pet. at A-31, he ultimately found that Mr. Hardy's conduct was not "so severe as to create a hostile work environment for plaintiff at Forklift," *id.* at A-26. It is important to bear in mind that the magistrate was charged with evaluating "the totality of the circumstances" in which "[n]o one factor alone determines whether particular conduct violates Title VII." *EEOC Policy Guidance*, Lab. Rel. Rep. (BNA) at 405:6691.¹⁰ That factual inquiry is ultimately a question of degree, and is quite properly left to the discretion of the trial courts.

¹⁰ The rulings, interpretations and opinions of the EEOC under Title VII constitute "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

In examining the totality of the circumstances, the magistrate carefully considered Mr. Hardy's behavior. He frankly found it offensive. Cert. Pet. at A-33. But he also examined the context in which the conduct occurred. For example, the magistrate found that "[o]ther females employed at Forklift were not offended by Hardy's vulgar sexual comments." *Id.* at A-18. Similarly, he found that "plaintiff tried to get far too much mileage out of" the "Holiday Inn" comment, because "[p]laintiff took the comment as a joke at the time" *Id.* at A-32-33. He further found that petitioner "loved her job . . .," that "[s]he and her husband socialized with Hardy and his wife . . .," that she "often drank beer and socialized with Hardy and her co-workers . . .," and that she "herself cursed and joked and appeared to her co-workers to fit in quite well with the work environment." *Id.* at A-34-35. Despite ample opportunity, "plaintiff was not inspired to broach the issue [of harassment] with [Hardy] for over two years." *Id.* at A-35. When she did complain, in a conversation secretly taped by petitioner, Mr. Hardy expressed surprise that petitioner had been offended and had taken his comments as anything other than jokes. *Id.* at A-25-26. As a result of her complaint, Mr. Hardy in fact stopped making such comments. According to petitioner's testimony, he made only one additional offensive comment, approximately one month later. (J.A. at 58.)

Furthermore, the magistrate found that the deterioration of the business relationship between petitioner's husband and Hardy "played more of a role in plaintiff's dissatisfaction with her job than plaintiff admitted. . . . I do not doubt that plaintiff had some bitter feelings

towards Hardy over this." Cert. Pet. at A-22-23. In addition, the magistrate did not assign any credibility to petitioner's testimony that she incurred any injury as a result of Hardy's conduct. *Id.* at A-34. Although petitioner argues that her testimony as to injury was "unrebutted," Pet'r Br. at 6, 43, she ignores the fact that it was *unbelieved*. Cert. Pet. at A-34. Similarly, the magistrate rejected her assertions that she had been discriminated against with respect to her salary, bonus, car allowance and review. *Id.* at A-40-45. In sum, having listened to petitioner's testimony, having observed her demeanor and having heard the uncontradicted testimony regarding disparate treatment, the magistrate did not believe her testimony on these crucial points.

Based on this evidence, the magistrate reasonably determined that petitioner had failed to demonstrate the existence of a hostile work environment at Forklift. The magistrate's view of the evidence is "plausible in light of the record viewed in its entirety" and therefore "cannot be clearly erroneous." *Anderson*, 470 U.S. at 473-74. Recognizing the deference these factual determinations are due, almost all of the petitioner's amici, including the EEOC, suggest only that the case be remanded; petitioner is all but alone in requesting reversal. But petitioner and her amici miss the point that even remand is unwarranted. The magistrate applied the correct legal standard and made factual findings that cannot be said to be clearly erroneous. Therefore, the decision of the lower court should be affirmed.¹¹

¹¹ Petitioner advances a separate argument challenging the magistrate's adverse determination on her constructive dis-

II. Petitioner's Alternative Standards Wholly Ignore Meritor's "Altered Conditions" Requirement

Hostile environment cases present courts with a difficult question, unique in Title VII jurisprudence: how does conduct unrelated to a specific job benefit nonetheless affect a term, condition or privilege of employment? *Meritor* answered this question by holding that such conduct violates Title VII when it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor*, 477 U.S. at 67 (alteration in original). The rationale for this rule is straightforward: if an employee must endure a "gauntlet of sexual abuse" to be a member of the workforce, she has suffered a work-related deprivation

charge claim, in effect asserting that a finding of sexual harassment would *compel* a finding of constructive discharge. The Court expressly limited review to the narrow question of whether psychological injury is a necessary element of a hostile environment claim under Title VII, and thus the issue of constructive discharge is not properly before this Court.

In addition, petitioner is simply wrong on this point. The EEOC and the majority of the courts require a plaintiff to show more than a violation of Title VII to establish constructive discharge. "[A]n employer is liable for constructive discharge when it imposes intolerable working conditions in violation of Title VII when these conditions foreseeably would compel a reasonable employee to quit, whether or not the employer specifically intended to force the victim's resignation." *EEOC Policy Guidance*, Lab. Rel. Rep. 405:6693 (and cases cited therein). Therefore, assuming *arguendo* that the magistrate erred in his findings on hostile environment, it does not follow automatically that petitioner was constructively discharged. Neither the EEOC nor any court has adopted petitioner's argument that the presence and effectiveness of internal grievance procedures are decisive on this issue.

by virtue of sex, and the terms and conditions of her employment have been altered. *Id.* (quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

A. Offensiveness Alone Does Not Necessarily Demonstrate the Existence of Discriminatory Employment Practices

Ignoring the reasoning of this Court in *Meritor*, petitioner argues that proving conduct to be "severe or pervasive" should suffice to establish a sexually abusive environment in violation of Title VII.¹² Her proposed standard considers only the "severity or pervasiveness" of the alleged harassment, without any inquiry into the effect of that conduct on the work environment. Pet'r Br. at 19-20. For petitioner, offensive conduct in the workplace is analogous to the concept of *res ipsa loquitur* in torts: the mere fact that offensive statements were made is enough to imply a violation of Title VII.

¹² Petitioner endorsed a different and equally flawed standard in her petition for writ of certiorari. There she argued that once she had demonstrated that she was offended and that a reasonable woman manager would be offended by the employer's conduct, she had established a violation of Title VII. Cert. Pet. at A-29-30. To support this argument, petitioner incorrectly cited *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) for the proposition that offensive conduct alone is sufficient to establish a violation of Title VII. Cert. Pet. at A-29. An examination of that case reveals, however, that the Ninth Circuit never adopted such a standard. In fact, the court indicated that unreasonable interference with work performance was the determinative factor in hostile environment cases. *Ellison*, 924 F.2d at 878 n.8 (citing *Meritor*, 477 U.S. at 65).

The plain language and purpose of the statute and the decisions of this Court mandate a standard that takes into account the actual effect of alleged harassment in the workplace. The statute requires that the Title VII plaintiff ground her claim in discrimination "*with respect to* [her] compensation, terms, conditions, or privileges of employment" 42 U.S.C. § 2000e-2(a)(1) (1988) (emphasis added). Unless discrimination affects a term, condition, or privilege of employment, it cannot violate Title VII. In arguing that Title VII prohibits "discrimination" without regard to "the result of the discrimination . . .," Pet'r Br. at 17, petitioner ignores the plain language of the statute.

Petitioner's standard is also inconsistent with the general purpose of Title VII. As the EEOC recognizes, "the statutory focus of Title VII [is] on the *effects*, rather than the motivation, of discriminatory practices." EEOC Br. at 13, n.8 (emphasis added). As this Court has repeatedly stated, "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422-23 (1975) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)) (emphasis supplied by the Court).¹³ Petitioner's insistence on evaluating harassment by focusing on the alleged harasser's actions in the abstract, without regard to the effect on the employee, is thus inconsistent with the clear purpose of the Act.

¹³ The legislative history of Title VII underscores that "[n]o bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities." H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), reprinted in 1964 U.S.C.C.A.N. 2391, 2393.

Petitioner's proposed rule similarly ignores the express language of *Meritor*. Although petitioner borrows the words "severe or pervasive" from *Meritor*, Pet'r Br. at 19, she disregards *Meritor*'s instruction that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII." *Meritor*, 477 U.S. at 67. "[M]ere utterance of an ethnic [or sexual] epithet which engenders offensive feelings in an employee would not affect the conditions of employment to [a] sufficiently significant degree to violate Title VII." *Id.* (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)). See also EEOC Br. at 18 (Isolated utterance of epithet may offend employee but not violate Title VII.). To violate Title VII, offensive conduct must be sufficiently severe or pervasive to "alter the conditions of [the victim's] employment and create an abusive working environment." *Meritor*, 477 U.S. at 67 (emphasis added) (alteration in original). The Court's use of the word "mere" before "utterance" and its use of the words "degree," "sufficiently," "alter," "significant" and "create" show clearly that the Court presumed that something beyond mere offense must be required. "The issue under Title VII is whether the employer has maintained a discriminatory working environment, not whether the employer has inflicted emotional distress." EEOC Br. at 9, 18.

The principal problem with petitioner's standard is that it rests on the *assumption* that offensive conduct automatically alters the conditions of employment and creates an abusive working environment. By refusing to

evaluate the impact of alleged harassment, petitioner severs hostile environment claims from Title VII and eliminates the critical need to establish that certain conduct has in fact interfered with a particular plaintiff's employment opportunity. Cf. EEOC Br. at 19 (Focus should be on equal employment opportunity.) Although the fact that conduct is offensive may create an inference of a hostile work environment, and thus be sufficient to survive a summary judgment motion, it does not, as petitioner argues, mandate a ruling for plaintiff. A plaintiff can prevail only if the conduct "altered the conditions of employment and created an abusive working environment," *Meritor*, 477 U.S. at 67, and it is in the trial court's discretion, absent clear error, to determine whether the particular conduct proved at trial had that specific result.

B. In Hostile Environment Cases It Is Especially Important To Demonstrate That Conduct Interferes with Work Performance

Requiring a plaintiff to show a nexus between conduct and ability to perform the job is particularly appropriate in cases such as this one, where the alleged harassment consists entirely of speech, and the adverse effect of the conduct at issue is far less obvious and direct than in other cases of discrimination or sexual harassment. Other Title VII plaintiffs can point to a specific job benefit they have been denied: a raise, a promotion, or the job itself, to name obvious examples. In these cases, both discrimination and deprivation of an employment opportunity are plainly present. Similarly, in a *quid pro quo* case the linkage between discriminatory conduct and employment opportunity is express. Moreover, when a

hostile environment is created through propositions for sexual favors or unwelcome physical contact, it may be relatively easy to see how the terms and conditions of a plaintiff's employment have been altered.

As the conduct becomes less physical, less directed at the plaintiff and less suggestive of requests for sexual favors, it becomes less obvious that the conduct has altered the terms and conditions of employment. It is for this reason that hostile environment plaintiffs bear the burden of demonstrating some nexus between offensive conduct and their ability to perform their jobs.¹⁴ Respondent does not contend that pure speech cannot rise to the level of a Title VII violation—only that it less obviously does so. Calling female employees "girls" or opening office meetings with a tasteless joke may constitute violations of Title VII, but it does not necessarily follow that they do. The question in such cases is necessarily one of degree, involving fine judgments on context, individual personalities and credibility. Clearly these issues must be entrusted to the sound discretion of the fact finder that receives the relevant evidence.

¹⁴ Petitioner argues, in essence, that because requiring a Title VII plaintiff to show serious psychological injury as a threshold would establish an impossible burden, no showing of altered conditions should be required. This proposition does not follow as a matter of logic, and *Meritor*, every court of appeal and the EEOC recognize that some showing of alteration of employment conditions is necessary to prove a violation of Title VII. See; pp. 9-13 above.

C. Alleged Harassment Must Be Considered from the Perspective of a Reasonable Person in the Position of the Plaintiff

Petitioner also argues that a court can determine whether conduct creates a hostile work environment "without resorting to any reasonable person standard." She suggests that "[t]he trier of fact would determine whether the plaintiff's allegations that the conduct was sexually offensive are credible and, in conjunction with other proof [not specified], establish that the severity or pervasiveness test is met." Pet'r Br. at 41.

Petitioner's attempt to assess harassment subjectively, rather than from the perspective of a reasonable person, is in direct conflict with all lower federal courts and the EEOC. All circuits agree that an employer's conduct must be viewed from the perspective of a reasonable person in the position of the plaintiff. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991); *Brooms v. Regal Tube Co.*, 881 F.2d 412, 419 (7th Cir. 1989); *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989), *aff'd in part, rev'd in part*, 900 F.2d 27 (4th Cir. 1990).¹⁵ See also EEOC Br. at 12-13; EEOC Policy Guidance, Lab. Rel. Rep. 405:6681 ("In determining whether harassment is sufficiently

¹⁵ The courts use several different formulations, including "reasonable person," *Brooms*, 881 F.2d at 419, "reasonable victim," see, e.g., *Paroline*, 879 F.2d at 105, and "reasonable woman," *Ellison*, 924 F.2d at 879; *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987). Petitioner attempts to make much of this distinction. Pet. Br. at 27-41. For the purposes of this case, the Court need not address the issue. The magistrate in this case based his determination on the perspective of "[a] reasonable woman manager under like circumstances." Cert. Pet. at A-34.

severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a 'reasonable person.' Title VII does not serve as a vehicle for vindicating the petty slights suffered by the hypersensitive."). Conduct that would have no effect on a reasonable person in similar circumstances simply is not "sufficiently severe or pervasive 'to alter the conditions of . . . employment" *Meritor*, 677 U.S. at 67. Moreover, grounding this threshold requirement in reasonableness gives employers and co-workers some notice of conduct that may violate Title VII and ensures that sexual harassment violations will be based on gender, not on mere sensitivity. Indeed, petitioner herself acknowledges in other parts of her brief that a standard of reasonableness is necessary to "protect[] employers from the claims of hypersensitive claimants." Pet'r Br. at 39-40.

Contrary to petitioner's assertion, a reasonable person standard does not ignore the defendant's conduct, or take the perspective of a "harasser," or transport with it all the demeaning stereotypes of women that persist in society at large. The standard is that of a reasonable person, not an unreasonable sexist. And the inquiry is whether the defendant's conduct – objectively viewed – creates an abusive and intimidating work environment. If the answer is negative, no violation of Title VII has occurred.

D. Examination of the Effect of the Alleged Harassment Is Necessary To Ensure That Title VII Regulates Employment Practices and Does Not Become a Content-Based Prohibition of Speech

Petitioner's proposed "offensiveness" standard would not only broaden Title VII beyond its Congressionally mandated limits, but would also create a serious conflict with the First Amendment. As petitioner would apply it, Title VII would punish speech merely because a plaintiff found the speech offensive. This Court's consistent First Amendment rulings forbid that result.

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). See also *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it."); *Street v. New York*, 394 U.S. 576, 592 (1969) (It is "firmly settled" that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.").¹⁶ This is true

¹⁶ See also *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) ("[W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power."); *Cohen v. California*, 403 U.S. 15, 21 (1971) (overturning conviction under breach of peace ordinance for wearing jacket bearing a profane slogan, refusing "to shut off discourse solely to protect others from hearing [objectionable speech] . . .").

even if the speech is offensive because it demeans certain groups or individuals on the basis of criteria such as gender, race or religion. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (dismissing indictment under St. Paul's Bias-Motivated Crime Ordinance for burning a cross in yard of black family because ordinance violated the First Amendment); *id.* at 2559 ("expressive activity [that] causes hurt feelings, offense, or resentment does not render the expression unprotected.") (White, J., concurring).¹⁷

To pass constitutional muster, Title VII cannot be construed to prohibit all speech that may be sexually offensive; rather, its ban must be limited to speech that is sufficiently offensive to have an impact on a plaintiff's ability to do her job. In effect, Title VII regulates "sexually derogatory 'fighting words,'" *id.* at 2546 (Scalia, J.), which if they are sufficiently severe and pervasive to alter the terms and conditions of employment, "merge into conduct" and "may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices." *Id.* at 2560 n.13 (White, J. concurring). Congress, however, may not constitutionally prohibit speech as an incidental or secondary effect of Title

¹⁷ See also *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (protecting under the First Amendment leaflets criticizing "practices [that] were offensive to [petitioners], as the views and practices of petitioners are no doubt offensive to others"); *Terminiello v. City of Chicago*, 337 U.S. 1, 3 (1949) (overturning conviction under breach of peace ordinance for speech that "vigorously, if not viciously, criticized various political and racial groups . . .").

VII's general prohibition against discriminatory employment practices unless the speech has a close nexus to conduct and an impact on a plaintiff's employment opportunities. See, e.g., *Boos v. Barry*, 485 U.S. 312, 321-22 (1988) (Regulations that focus on "the direct impact that speech has on its listeners" are content-based; the "emotive impact of speech on its audience is not a 'secondary effect.'"); *R.A.V.*, 112 S. Ct. at 2549 (same). Thus, the courts can avoid a direct conflict with the First Amendment only by ensuring that Title VII regulates employment practices and not, as petitioner proposes, merely offensive speech.

CONCLUSION

The magistrate correctly found that petitioner failed to establish her Title VII claim. Because no decision by the Court on the question presented can mandate reversal or remand, the decision of the lower court should be affirmed.

Respectfully submitted,

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In The
Supreme Court of the United States

October Term, 1992

TERESA HARRIS,

Petitioner,

v.

FORKLIFT SYSTEMS, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

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ARGUMENT

I. THE FINDINGS RELIED UPON BY FORKLIFT CANNOT SUPPORT AFFIRMANCE ON INDEPENDENT GROUNDS BECAUSE THEY WERE MADE UNDER THE WRONG LEGAL STANDARD.

Notwithstanding its concession that psychological injury is not a necessary element of proof in a hostile environment case, Forklift, nevertheless, suggests that the decision below should be affirmed because independent grounds exist which support dismissal of Ms. Harris' claim. (Respondent's Brief, p. 18). Forklift's argument is legally incorrect.

When the wrong legal standard has been applied by a lower court this Court has reversed the decision below, and, usually, remanded for further consideration. *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Wilson v. Seiter*, 111 S.Ct. 2321 (1991). It is likely when a lower court has erred with regard to the legal standard, that the lower court has also not fully considered all the evidence or has misconstrued the evidence. *Wilson v. Seiter*, 111 S.Ct. at 2328 (1991).

This is such a case. The findings upon which Forklift relies are inseparable from the magistrate's mistaken belief that a Title VII plaintiff must establish serious psychological injury as a necessary element of proof in a hostile environment case. The magistrate's search for psychological injury permeates each of the findings Forklift recites as an independent basis in support of affirmance. Specifically, the conclusion that Mr. Hardy's conduct would not have interfered with a reasonable woman manager's performance, is preceded by the magistrate's

observation that "I do not believe they [referring to Hardy's inappropriate sexual comments] were so severe as to be expected to seriously affect plaintiff's psychological well-being." (Pet. for Cert. App. A33 - A34). These statements are then, in turn, followed by the statement that "[n]either do I believe that plaintiff was subjectively so offended that she suffered injury . . . " from which the magistrate concludes ". . . I do not believe that he (Hardy) created a work environment so poisoned as to be intimidating or abusive to plaintiff." (Pet. for Cert. App. A34 - A35).

These findings flow directly from, and are inexorably tainted by, the magistrate's reliance upon the *Rabidue* rule which, the parties agree, is wrong as a matter of law. Each "finding" cited by Forklift is imbued with and infected by the magistrate's conviction that psychological injury is a prerequisite for hostile environment liability. Being skewed as they are by an erroneous legal standard, these findings cannot be relied upon in support of the judgment below. *Pullman-Standard v. Swint*, 456 U.S. at 292 (1982); accord, *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 502, n. 17 (1984) (A finding of fact is sometimes inseparable from the principles through which it was deduced).

Forklift attempts to avoid reversal by suggesting that the psychological injury test did not receive any particular weight or emphasis by the magistrate. This argument is belied by those very sections of the magistrate's Report and Recommendation upon which Forklift relies, which are replete with references to the magistrate's opinion that Ms. Harris' psychology harm or injury were insubstantial. (Pet. for Cert. App. A21 - A36). Furthermore,

there is no basis in the record for Forklift's assertion that the magistrate did not rely explicitly upon the psychological injury requirement of *Rabidue* when he denied Forklift's Motions to Dismiss. (Respondent's Brief, pp. 17-18). The Motions to Dismiss were both general and unspecific. There is nothing from which to discern either the bases for Forklift's Motions to Dismiss or the reasons for which they were denied, other than the magistrate's desire to have a complete record. (J.A. 136, 224).

II. THE PARTIES AGREE THAT *RABIDUE* IS WRONG.

Forklift concedes, and, thus, the parties agree¹ that psychological injury should not be a necessary element of proof in a sexual harassment claim alleging a hostile work environment. (Petitioner's Brief, pp. 12-16; Respondent's Brief, p. 14). Since *Rabidue* requires a finding of psychological harm, it is an erroneous application of the principles previously established by this Court. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

¹ All amici concur that psychological injury is not necessary for hostile environment liability with the exception of the Equal Employment Advisory Council, amici for Forklift, which did not specifically state any position on the psychological injury requirement in its brief. Equal Employment Opportunity Commission Brief, p. 22, n.13; NAACP Legal Defense Fund Brief, p. 13; NOW Legal Defense Fund Brief, p. 8; Women's Legal Defense Fund Brief, p. 5; American Civil Liberties Union Brief, p. 7; Feminists for Free Expression Brief, p. 29; National Employment Lawyer Association Brief, p. 4; Employment Law Center Brief, p. 6; American Psychological Association Brief, p. 6; Southern States Police Benevolent Brief, p. 3; National Conference of Women's Bar Association Brief, p. 9.

III. THE CORRECT APPLICATION OF MERITOR MUST FOCUS UPON HOW THE HARASSER'S CONDUCT ALTERED THE CONDITIONS OF THE VICTIM'S EMPLOYMENT.

A. In Order To Alter Conditions Of Employment, Unwelcome Conduct Based Upon Sex Must Be Either Severe Or Pervasive.

Under *Meritor*, unwelcome conduct, based on sex, must be either severe or pervasive if it is to rise to a level of being unlawful.² The admonition of this Court that the "mere utterance" of a gender based epithet which engenders offensive feelings in an employee would not alter the condition of employment leaves no room for disagreement. *Meritor Savings Bank v. Vinson*, 477 U.S. at 67 (1986) quoting *Rogers v. EEOC*, 454 F.2d 234 at 238 (5th Cir. 1971). Thus, isolated incidents or trivial slights are not sufficiently severe or pervasive, in and of themselves, to alter a work environment in violation of Title VII. This Court, and many of the courts of appeals, have exhibited no difficulty in making specific findings in hostile environment cases that unwelcome conduct has been either severe or pervasive. *Meritor Savings Bank v. Vinson*, 477 U.S. at 67 (1986); *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3rd Cir. 1990); *Hall v. Gus Construction Co.*, 842 F.2d 1010 (8th Cir. 1988).

² Forklift incorrectly asserts that under Ms. Harris' view, offensive conduct need not alter the conditions of employment. This is a mischaracterization of Ms. Harris' position. (Respondent's Brief, p. 24; see, Petitioner's Brief, pp. 11, 29 and 40).

With respect to the severity or pervasiveness of unwelcome sexual conduct, the workplace must be considered objectively and the conduct in its totality. The parties agree to those factors suggested by the Equal Employment Opportunity Commission which courts should consider such as whether the conduct was physical, verbal or some combination of the two; the frequency and repetitiveness of the conduct; whether the conduct was hostile or potentially offensive; whether the harasser was a supervisor or co-worker; whether others joined in the conduct; and whether the conduct was directed at one or more persons. See *EEOC, Policy Guidance on Current Issues of Sexual Harassment (1989-91 Transfer Binder) CCH Employment Practices ¶ 5258* at 6928 (March 19, 1990); (Petitioner's Brief, pp. 19-20; Respondent's Brief, p. 18). In evaluating the severity and pervasiveness of unwelcome conduct, courts must consider the conduct as a continuum and not in isolation. *Burns v. McGregor Electronics Ind.*, 955 F.2d 559 (8th Cir. 1993). Consideration of the conduct in its totality is necessary because less severe conduct may have greater impact in the workplace the more it is repeated. See *Risinger v. Ohio Bureau of Worker's Compensation*, 883 F.2d 475 (6th Cir. 1989).

Applying these principles, this Court can take note that the magistrate found that Ms. Harris was the object of a continuing pattern of sex-based derogatory conduct. (Pet. for Cert. App. A13 - A15). The magistrate also found that Hardy's conduct created a "joking" environment at Forklift. (Pet. for Cert. App. A18). These findings, viewed objectively and in their totality, support the conclusion that Hardy's conduct pervaded the workplace.

With respect to the severity of Hardy's conduct, it is clear from the record that it was a fixture in the Forklift workplace. The "joking" environment engendered by Hardy was tolerated by some female clerical employees who, the magistrate found, were used to accepting his denigrating behavior. (Pet. for Cert. App. A18, A31 - A32). The conduct ranged from the "inane and adolescent" to the "truly gross and offensive" (Pet. for Cert. App. A32 - A33). The source of the conduct was Ms. Harris' superior and the President of Forklift. The magistrate found the conduct to be both personally offensive and unwelcome to Ms. Harris and sufficiently egregious to be offensive to a reasonable person in Ms. Harris' position. (Pet. for Cert. App. A33 - A34). Because the conduct was repetitive, wide-ranging in its content and offensiveness and emanated from the chief executive of the company, under the principles announced in *Meritor*, the conduct was also severe.

B. If Unwelcome Conduct Is Severe And/Or Pervasive, The Next Inquiry Is Whether It Was Sufficient To Alter The Conditions Of The Victim's Employment.

Title VII invests in the employees the right to work in an environment free from discriminatory conduct which imposes upon workers different terms and conditions because of their sex, age, race, religion or national origin. 78 Stat. 253, 42 U.S.C § 2000e-2(a)(1).

Forklift contends that workplace conditions are sufficiently altered only if an employee can either prove psychological injury or such interference with actual work

performance to impair a victim's actual ability to do his or her job. (Respondent's Brief, p. 28). As construed by Forklift, however, the phrase "interference with job performance" becomes the proverbial back door for reimposing the *Rabidue* rule of psychological injury.

It is difficult to imagine how a plaintiff might demonstrate an inability to perform his or her job with anything short of a showing of psychological injury. Thus, Forklift's proposed interpretation of *Meritor* reimposes the element that Forklift itself purports to reject: a showing of a psychological injury as a prerequisite to finding a Title VII violation. It is in this respect that Forklift's concession that psychological injury is not a necessary element of proof in a Title VII action is illusory.

Ms. Harris suggests, consistent with the arguments of amici Equal Employment Opportunity Commission and the American Psychological Association, that alteration of the conditions of employment be viewed expansively to encompass the entire range of effects that severe or pervasive offensive work place conduct based on sex may have on a victim's work environment. Consideration of the full range of such effects is fully consistent with the principles announced in *Meritor*. Thus, the Equal Employment Opportunity Commission considers interference with work performance to include, but not necessarily be limited to, hampered opportunities to succeed, the imposition of degrading behavior, or the denial of credit for work performed. (Equal Employment Opportunity Commission Brief, p. 25). It appears, in this respect, that the phrase "interference with work performance", may be too restrictive.

Research conducted on the effects of sexual harassment is presented and discussed in the amicus brief

submitted by the American Psychological Association.³ The effects reported in the research includes deteriorated relationships with fellow employees, decreased feelings of competence, loss of self-esteem, loss of motivation, lack of recognition for accomplishments and lack of respect. (American Psychological Association Brief, pp. 7-8).

The research, as reported in the American Psychological Association Brief, supports the conclusion that offensive sex-based workplace conduct, if found to be either severe or pervasive, will alter the conditions of a victim's employment. Thus, to the extent that a plaintiff proves that he or she has been subject to such unwelcome conduct which is either severe or pervasive and can credibly establish similar sequelae of that conduct, the principles of *Meritor* have been satisfied.

Upon consideration of the full range of effects that severe and/or pervasive offensive workplace conduct may have, the record before the Court clearly establishes that the conduct Teresa Harris endured at Forklift was sufficient to alter the conditions of her employment. Teresa Harris testified that, as a result of Charles Hardy's conduct, she cried, was emotionally upset, hated going to work and, when at work, would sit in her office and shake. (J.A. 53). In her meeting with Charles Hardy on August 18, 1987, Charles Hardy himself acknowledged that Teresa Harris had been avoiding him. (J.A. 73). Charles Hardy's conduct brought Teresa Harris to the

³ The Amicus Brief of the American Psychological Association was submitted on behalf of neither party.

point of tendering her resignation. (Pet. for Cert. App. A16). The sequelae of the harassment experienced by Ms. Harris are consistent with the research reported by amici American Psychological Association in its brief.

Charles Hardy questioned Ms. Harris' job performance publicly in the workplace with his statement about "[n]eeding a man as a rental manager"; he also ridiculed her competence with his workplace statements of "You're a woman, what do you know", and "You're a dumb ass woman". Similarly, the "truly gross and offensive statement" made in front of her co-workers suggesting that Ms. Harris had given sexual favors to secure a client not only denied Ms. Harris credit for her job performance, but was especially demeaning to a person in a managerial position. None of the conduct complained of by Ms. Harris was directed towards male employees. The conduct would not have been tolerated had it been directed to the spouse of either Mr. Hardy or another male Forklift manager. (J.A. 98, 233).

The conduct Ms. Harris was subjected to was continuous and of long duration; it was offensive to Ms. Harris and would have offended a reasonable person in her position⁴; it pervaded the workplace and affected her to the point that she was willing to, and later did, leave a job she enjoyed to avoid the conduct. Even applying the wrong legal standard, the magistrate observed that this was a "close case". (Pet. for Cert. App. A31). Under a correct application of *Meritor*, the conduct of Charles

⁴ The parties agree that unwelcome workplace conduct should be considered from the viewpoint of a reasonable person in the position of the plaintiff (or victim). (Petitioner's Brief, pp. 34-40; Respondent's Brief, pp. 29-30).

Hardy should be found to be sufficiently severe or pervasive to alter Teresa Harris' working conditions in violation of Title VII. See *U.S. v. Fordice*, 112 S.Ct. 2737 (1992).

IV. THE MERITOR RULE AS APPLIED TO THE FACTS OF THIS CASE DOES NOT IMPLICATE ANY FIRST AMENDMENT CONCERNS.

This Court just recently held that the First Amendment does not protect "sexually derogatory fighting words" which may violate Title VII's general prohibition against sexual discrimination in employment. *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2546 (1992). The First Amendment concern raised by Forklift is based upon the misconception that Ms. Harris was advocating a mere "offensiveness" standard for hostile environment liability. (Respondent's Brief, p. 31). On the contrary, Ms. Harris' Brief on the Merits is replete with references to the requirement that unwelcome sex-based workplace conduct must be sufficiently severe or pervasive to alter the conditions of the victim's employment. (Petitioner's Brief, pp. 11, 29, 40, 50). The standard advocated by Ms. Harris is fully consistent with this Court's view that "sexually derogatory fighting words" are not protected under the First Amendment.

In addition, as correctly argued by amici Feminists for Free Expression, there should be no First Amendment concern involved where such workplace conduct is directed at a particular employee. (Brief of amici Feminists for Free Expression, pp. 10-11). There is no question that in this record the conduct of which Ms. Harris complained was specifically directed at her as well as at other

female employees of Forklift. (Pet. for Cert. App., A13 - A15).

Thus, whatever First Amendment concerns are raised by Forklift or amici American Civil Liberties Union in their respective briefs, do not arise from the facts of this case, and, therefore, should not be addressed by this Court.

CONCLUSION AND PRAYER

For the reasons discussed above and in her opening brief, Ms. Harris respectfully requests that this Court reverse the judgments below dismissing her hostile environment and constructive discharge claims and enter judgment for her.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1992

TERESA HARRIS, PETITIONER

v.

FORKLIFT SYSTEMS, INC.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**BRIEF FOR THE UNITED STATES AND
THE EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION AS AMICI CURIAE**

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QUESTION PRESENTED

Whether a plaintiff who seeks relief under Title VII of the Civil Rights Act of 1964 from hostile environment sexual harassment must show that the harassment has "psychological" effects.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1168

TERESA HARRIS, PETITIONER

v.

FORKLIFT SYSTEMS, INC.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AND
THE EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION AS AMICI CURIAE

**INTEREST OF THE UNITED STATES AND THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

The Attorney General and the Equal Employment Opportunity Commission (EEOC) share important responsibilities for enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which prohibits, *inter alia*, discrimination in terms and conditions of employment. The EEOC has also issued regulations and policy statements that provide interpretive guidance in applying Title VII to claims of hostile environment sexual harassment. See 29 C.F.R. 1604.11(a); see also *EEOC: Policy Guidance on Sexual Harassment*, 8 F.E.P. Manual (BNA) 405:6681 (issued Mar. 19, 1990).

(1)

STATEMENT

Petitioner challenges a decision of the United States Court of Appeals for the Sixth Circuit, which affirmed a dismissal of her Title VII sexual harassment suit. See Pet. App. A1-A3. She alleges that her employer, respondent Forklift Systems, Inc., maintained a hostile work environment that led to her constructive discharge, and she seeks injunctive relief and backpay. The United States District Court for the Middle District of Tennessee adopted a magistrate's report recommending that petitioner's suit be dismissed. *Id.* at A4-A5. The magistrate concluded that petitioner was not entitled to Title VII relief under the controlling Sixth Circuit precedent, because the employer's conduct was not "so severe as to be expected to seriously affect the plaintiff's psychological well-being." *Id.* at A33-A34.¹

1. The magistrate's report contains findings of fact with respect to petitioner's hostile environment claim. Pet. App. A7-A21. As the magistrate explained, Forklift Systems is a Tennessee corporation that sells, leases, and repairs forklift trucks. *Id.* at A8. The President of Forklift Systems, Charles Hardy, supervises six managers: the Office Manager; the Sales Manager; the Rental Manager; the Service Manager; the Parts Manager; and the Comptroller. *Id.* at A8-A9. Petitioner was the Rental Manager from April 22, 1985, to October 1, 1987. During that period, petitioner and the Office Manager (Hardy's daughter) were the only female managers. *Ibid.* Hardy also had a business relationship with petitioner's husband, Larry Harris. Hardy had loaned money to Harris to finance a company, Cellular Power, that supplied Forklift Systems with batteries. *Id.* at A20-A21.

¹ Petitioner also contended that she was subject to discriminatory treatment in compensation and travel allowances. The magistrate resolved those allegations in Forklift's favor, finding that the "discrepancies [were] attributable to factors other than sex discrimination." Pet. App. A10. Those claims are not at issue here.

While employed at Forklift Systems, petitioner "was the object of a continuing pattern of sex-based derogatory conduct from Hardy." Pet. App. A13. For example, Hardy repeatedly made denigrating remarks to Harris, in the presence of other Forklift Systems employees, such as "You're a woman, what do you know," "You're a dumb ass woman," and "We need a man as the rental manager." *Ibid.* Hardy also joked to petitioner, again in front of Forklift Systems employees and a Forklift Systems supplier, by saying, "Let's go to the Holiday Inn to negotiate your raise." *Id.* at A14.² Hardy asked petitioner and other female employees to retrieve coins from his front pants pocket and to pick up objects that he would throw on the floor in front of them, but did not make those requests of male employees. *Id.* at A14-A15. Hardy remarked "with sexual innuendos" about the attire of petitioner and other female employees. *Id.* at A15. Hardy also indulged in a "running joke that large breasted women are that way because they eat a lot of corn." *Id.* at A32.³

² The magistrate evaluated that comment "In [the] context of the fact that the company often conducted management meetings at a nearby Holiday Inn," stating that petitioner "knew this [comment] was meant as a joke, and treated it as a joke at the time." Pet. App. A14. The magistrate concluded that the comment "show[ed] Hardy to be a man with a bad sense of humor, but it was not a sexual proposition." *Id.* at A32.

³ Petitioner presented evidence of other sexually offensive conduct that was not specifically mentioned among the magistrate's illustrative examples. For example, petitioner testified that "on more than one occasion," Hardy had suggested, in front of others, that the two commence a sexual relationship. Tr. 20. Petitioner recalled Hardy saying, "Oh, by the way, Teresa, don't you think it is about time we started screwing around? You and Larry have been married over a year now." *Ibid.* According to petitioner, Hardy commented on her anatomy, referring to her buttocks as "a racehorse ass." Tr. 24. She testified that after Hardy and his wife returned from a vacation in Florida, Hardy described the bikinis worn on the beach and stated to petitioner, "Of course you couldn't wear one like that because your ass is so big, if you did there would be

Petitioner met with Hardy on August 18, 1987, "to complain about his treatment [of] her" and threatened to resign. Pet. App. A15-A16. During the meeting, Hardy "admitted making some of the comments, but said they were 'jokes.'" *Id.* at A16. Hardy claimed that he was previously unaware that petitioner "was offended by any of his conduct," and "apologized and promised that his offensive behavior would cease." *Ibid.* Based on Hardy's assurances, petitioner decided not to resign. *Ibid.* "Shortly after the August 18th meeting," Hardy resumed his "offensive behavior" by "suggesting that [petitioner] promised sexual favors to a customer in order to secure an account." *Id.* at A16-A17. Hardy asked petitioner, in front of other Forklift Systems employees, "What did you do, promise the guy at ASI (Alladin Synergetics, Inc.) some 'bugger' Saturday night?" *Id.* at A17.

On October 1, 1987, petitioner collected her paycheck and left her job at Forklift Systems. She met with an attorney the following day and filed a complaint with the EEOC on Monday, October 5, 1987. Pet. App. A17. After petitioner filed her EEOC complaint, Hardy altered his desk calendar and petitioner's personnel file, and "made some notes in order to manufacture a justification for her termination." *Id.* at A19.⁴ On October 7, 1987, a few days after petitioner quit her job at Forklift Systems

an eclipse and nobody could get any sun." Tr. 25. Dixie Shadrake, a former clerical employee of Forklift, testified that Hardy would suggest turning down the air conditioning when a female employee wore a tight shirt because of the effect of the lower temperature on the woman's breasts. Tr. 76.

⁴ The back-dated notes indicated that "Hardy was considering terminating [petitioner] because she could not get along with the receptionist." Pet. App. A19-A20. Former receptionists testified, however, that "they had no real problems with [petitioner]," and the magistrate found "no credible proof that Hardy was ever dissatisfied with [petitioner's] job performance or ever intended to fire her." *Id.* at A20. Rather, the magistrate found that petitioner "was good at her job, and did not receive any substantial criticism from Hardy." *Id.* at A19.

and filed a charge with the EEOC, Forklift Systems cancelled its account with Cellular Power. *Id.* at A20.⁵

2. After reciting the foregoing factual findings, the magistrate evaluated whether they entitled petitioner to relief. At the outset, the magistrate "discounted" the employer's argument that petitioner's Title VII suit was pretextual and that she quit her job because of the deteriorating business relationship between Hardy and her husband. Pet. App. A21-A24. The magistrate stated that the evidence showed that "Hardy is a vulgar man and demeans the female employees at his work place." *Id.* at A24. He observed that "[m]any clerical employees" at Forklift Systems "tolerate [Hardy's] behavior and, in fact, view it as the norm and as joking," but the failure of those employees to take offense did not mean that petitioner, a manager, shared that view. *Id.* at A24-A25. Indeed, petitioner felt that "Hardy's sexual comments undermined her authority," which "was especially painful when Hardy would make demeaning sexual comments to [petitioner] in front of her coworkers." *Id.* at A25.

The magistrate nevertheless concluded that petitioner had failed "to prove that Hardy's conduct was so severe as to create a hostile work environment." Pet. App. A26. The magistrate stated:

In the Sixth Circuit, the test for whether or not sexual harassment rises to the level of a hostile work environment is whether the harassment is "conduct which would interfere with that hypothetical reasonable individual's work performance and affect seriously the psychological well-being of that reasonable person under like circumstances." * * * Once the objective "reasonable person" test is met, the court must next determine if the victim was subjectively

⁵ Hardy's secretary informed Larry Harris of the cancellation by telephone and confirmed it in a letter dated October 7, 1987. Pet. App. A20-A21. After Cellular's account was cancelled, Larry Harris stopped repaying Hardy's loan and Hardy sued Harris on the note in state court. *Id.* at A20.

offended and suffered an injury from the hostile work environment.

Id. at A28-A29, quoting *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987). Although the magistrate considered this "a close case," he concluded that many of "Charles Hardy's comments cannot be characterized as much more than annoying and insensitive." Pet. App. A31.

The magistrate stated that "[m]ost of Hardy's wisecracks about females' clothes and anatomy were merely inane and adolescent, such as the running joke that large breasted women are that way because they eat a lot of corn." Pet. App. A31-A32. The magistrate similarly characterized "Hardy's coin dropping and coin-in-the-pocket tricks." *Id.* at A32. The magistrate noted that the other female employees at Forklift Systems "considered Hardy a joker" and were not offended by Hardy's vulgar sexual comments, but that petitioner "was more sensitive" to Hardy's behavior than the "clerical employees, who it appears were conditioned to accept denigrating treatment." *Id.* at A31-A32.⁶

The magistrate viewed as "more objectionable" Hardy's comments that petitioner was a "dumb ass woman" and "you're a woman, what do you know." Pet. App. A33. The magistrate found "truly gross and offensive" Hardy's remark suggesting that petitioner "promised sexual favors to a customer in order to secure an account," but noted that the remark was not made in front of a client, but in

⁶ According to the testimony of several former Forklift Systems clerical employees, "Hardy's frequent jokes and sexual comments were just part of the joking work environment at Forklift." Pet. App. A18. Those employees were not offended by Hardy's behavior and were unaware that petitioner was offended. *Ibid.* The magistrate specifically pointed to the testimony of a former receptionist who "aptly expressed her feelings about comments Hardy may have made about her body" when she "jauntily testified, 'lots of people make comments about my breasts.'" *Ibid.*

front of other Forklift Systems employees. *Ibid.* The magistrate believed that "some of Hardy's inappropriate sexual comments, especially this last one, offended [petitioner], and would offend the reasonable woman." *Ibid.* The offensive comments, however, were not

so severe as to be expected to seriously affect [petitioner's] psychological well-being. A reasonable woman manager under like circumstances would have been offended by Hardy, but his conduct would not have risen to the level of interfering with that person's work performance.

Id. at A34. The magistrate also concluded that petitioner was not "subjectively so offended that she suffered injury, despite her testimony to the contrary." *Ibid.*⁷

Turning to petitioner's claim of constructive discharge, the magistrate was "moved" by the fact that after petitioner informed Hardy "that his sexual comments were not jokes to her, Hardy did not stop altogether," but made his "crude" remark about promising sex to a client. Pet. App. A39. The magistrate concluded, however, that "since things were just annoying and not that bad before," Hardy's further offensive comment did not make it foreseeable that petitioner would resign. *Id.* at A39-A40. While that comment might have prompted petitioner to speak again to Hardy "or reprimand him sharply at the time of the comment," the magistrate found, "[i]t would not drive a reasonable person, even a reasonable female

⁷ In support of that conclusion, the magistrate cited petitioner's testimony that she had loved her job at Forklift Systems, that she and her husband had socialized with Hardy and his wife, and that she "often drank beer and socialized with Hardy and her co-workers." Pet. App. A34-A35. The magistrate also observed that although "[t]he channels of communication were open" between petitioner and Hardy, she waited two years before complaining of his offensive conduct. *Id.* at A35. Thus, "[a]lthough Hardy may at times have genuinely offended [petitioner]," the magistrate did not "believe that he created a working environment so poisoned as to be intimidating or abusive to [her]." *Ibid.*

manager, to quit.” *Id.* at A40. Having concluded that Harris had failed to establish a sexually hostile work environment or constructive discharge in violation of Title VII, the magistrate recommended that her complaint be dismissed. *Id.* at A45.

3. The district court adopted the magistrate’s report, finding petitioner’s objections to be “without merit,” and dismissed the case. Pet. App. A4-A5. The court of appeals affirmed in an unpublished per curiam opinion, relying “upon the reasoning found in the report and recommendation of the magistrate judge.” Pet. App. A1-A3.

SUMMARY OF ARGUMENT

This Court has held that Title VII of the Civil Rights Act of 1964 provides relief from sexual harassment in the workplace if the harassment is “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’” *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). The EEOC’s regulations and policy statements explain that “hostile environment” sexual harassment is actionable if the harassment would interfere with the job performance of a reasonable person who is subjected to that conduct. The court of appeals erred in holding that a plaintiff who seeks equitable relief under Title VII must additionally show that the harassment has “psychological” effects.

Title VII does not expressly require a plaintiff to demonstrate “psychological” injury. The Sixth, Seventh, and Eleventh Circuits have adopted a “psychological effects” requirement by mistakenly adopting inapposite language from other lower court decisions. The language that has been converted into a “psychological effects” test was first used not to establish a standard for hostile environment discrimination, but to describe some of its consequences. As the Ninth Circuit has explained, that extra-textual requirement for Title VII relief serves no useful

purpose and misdirects the Title VII inquiry. The issue under Title VII is whether the employer has maintained a discriminatory working environment, not whether the employer has inflicted emotional distress. The standard that we urge—whether the objectionable conduct would affect a reasonable victim’s performance of the job—properly focuses the inquiry on the equal employment opportunity concerns that are central to Title VII.

ARGUMENT

A PLAINTIFF MAY OBTAIN RELIEF UNDER TITLE VII FROM HOSTILE ENVIRONMENT SEXUAL HARASSMENT WITHOUT PROVING THAT THE HARASSMENT WOULD HAVE ADVERSE PSYCHOLOGICAL EFFECTS

A. An Employee Establishes Hostile Environment Sexual Harassment By Showing That The Objectionable Workplace Conduct Is Sufficiently Severe Or Pervasive To Interfere With The Job Performance Of A Reasonable Person Who Is Subjected To That Conduct

Title VII of the Civil Rights Act of 1964 states that it shall be an unlawful employment practice for an employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. 2000e-2 (a)(1). This Court determined in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), that an employee may obtain injunctive relief and backpay under Title VII for “hostile environment” sexual harassment. The question in this case is what constitutes an adequate showing of that type of harassment for purposes of Title VII. We submit that a plaintiff may seek relief from hostile environment sexual harassment if the objectionable conduct is sufficiently severe or pervasive to create discrimination in the terms and conditions of employment. Objectionable conduct is sufficiently severe or pervasive

if it would interfere with a reasonable person's ability to perform the job.

1. This Court recognized in *Meritor Savings Bank, FSB v. Vinson*, *supra*, that "[w]ithout question, when a supervisor harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." 477 U.S. at 64. It additionally recognized that harassment of that sort can amount to discrimination with respect to "compensation, terms, conditions, or privileges of employment." *Ibid.* The Court explained that "Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." *Vinson*, 477 U.S. at 64, quoting *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978), and *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir.), cert. denied, 404 U.S. 991 (1971).

The Court agreed with the Fifth Circuit's conclusion in *Rogers v. EEOC*, 454 F.2d 234 (1971), cert. denied, 406 U.S. 957 (1972), a racial discrimination case, that

[t]he phrase "terms, conditions or privileges of employment" in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. * * * One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.

Vinson, 477 U.S. at 66, quoting *Rogers*, 454 F.2d at 238. The Court explained that "[n]othing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited." *Vinson*, 477 U.S. at 66. The Court quoted approvingly the Eleventh Circuit's observation in *Henson v. Dundee*, 682 F.2d 897 (1982):

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

Vinson, 477 U.S. at 67, quoting *Henson*, 682 F.2d at 902.

The Court noted, however, "as the courts in both *Rogers* and *Henson* recognized," that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII." *Vinson*, 477 U.S. at 67. "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Ibid.*, quoting *Henson*, 682 F.2d at 904.

2. The Court's decision in *Vinson* relied heavily on the EEOC Guidelines "specifying that 'sexual harassment', as there defined, is a form of sex discrimination prohibited by Title VII." 477 U.S. at 65. The Court noted that those Guidelines, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Ibid.*, quoting *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-142 (1976), and *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

The EEOC Guidelines that the Court cited remain in force and state in relevant part:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly

or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. 1604.11(a). The EEOC Guidelines additionally state:

In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

29 C.F.R. 1604.11(b).

Following the Court's decision in *Vinson*, the EEOC issued additional policy guidance concerning Title VII's prohibition on sexual harassment. See *EEOC: Policy Guidance on Sexual Harassment*, 8 F.E.P. Manual (BNA) 405:6681 (issued Mar. 19, 1990) [hereinafter *EEOC Guidance*]. The EEOC's policy guidance, which was issued to EEOC field office personnel for use in enforcing Title VII, discussed a number of topics, including what conduct would have the effect of "creating an intimidating, hostile, or offensive working environment" (29 C.F.R. 1604.11(a)). *EEOC Guidance*, 8 F.E.P. Manual (BNA) at 405:6689.

As the EEOC's policy guidance explains, a "hostile environment" exists if the employer engages in a pattern of objectionable conduct that would interfere with the job performance of a reasonable person who is subjected to that conduct. The EEOC stated at the outset:

In determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a "reasonable person." Title VII does not serve "as a vehicle for vindicating the petty slights suffered by the hypersensitive." * * * Thus, if the challenged conduct would not substantially affect the work environment of a reasonable person, no violation should be found.

EEOC Guidance, 8 F.E.P. Manual (BNA) at 405:6689. However, the EEOC also explained:

The reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior. For example, the Commission believes that a workplace in which sexual slurs, displays of "girlie" pictures, and other offensive conduct abound can constitute a hostile work environment even if many people deem it to be harmless or insignificant.

Id. at 405:6690.⁸

The EEOC stated that "[a] 'hostile environment' claim generally requires a showing of a pattern of offensive conduct," although "a single, unusually severe incident of

⁸ The so-called "reasonable victim" standard comports with the statutory focus of Title VII on the effects, rather than the motivation, of discriminatory practices. See *Rogers*, 454 F.2d at 238-239 ("the absence of discriminatory intent by an employer does not redeem an otherwise unlawful employment practice"; "the thrust of Title VII's proscriptions is aimed at the consequences or effects of an employment practice and not at the employer's motivation"), citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); see also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422-423 (1975) ("[A] worker's injury is no less real simply because his employer did not inflict it in 'bad faith.' Title VII is not concerned with the employer's 'good intent or absence of discriminatory intent' for 'Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.'" (emphasis supplied by Court)).

harassment may be sufficient to constitute a Title VII violation," especially "when the harassment is physical." *EEOC Guidance*, 8 F.E.P. Manual (BNA) at 405:6690 to 405:6691. "When the alleged harassment consists of verbal conduct, the investigation should ascertain the nature, frequency, context, and intended target of the remarks." *Id.* at 405:6691. The EEOC also stated:

Although the Guidelines specifically address conduct that is sexual in nature, the Commission notes that sex-based harassment—that is, harassment not involving sexual activity or language—may also give rise to Title VII liability (just as in the case of harassment based on race, national origin or religion) if it is "sufficiently patterned or pervasive" and directed at employees because of their sex.

Acts of physical aggression, intimidation, hostility or unequal treatment based on sex may be combined with incidents of sexual harassment to establish the existence of discriminatory terms and conditions of employment.

Id. at 405:6692 (citations omitted). Finally, the EEOC stated that an employer is liable for constructive discharge "when it imposes intolerable working conditions in violation of Title VII when those conditions foreseeably would compel a reasonable employee to quit, whether or not the employer specifically intended to force the victim's resignation." *Id.* at 405:6693.

B. An Employee Is Not Required To Show That The Objectionable Workplace Conduct Has Psychological Effects

The Court's decision in *Vinson* and the EEOC's policy guidance are entirely consistent in defining when an employee may seek equitable relief under Title VII for hostile environment sexual harassment. Sexual harassment is actionable if it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment

and create an abusive working environment,' " *Vinson*, 477 U.S. at 67. That standard is satisfied if the harassment would interfere with a reasonable victim's job performance, regardless of whether the conduct is directed at an individual victim or at a protected class of victims. See 29 C.F.R. 1604.11(a)(3); see generally *EEOC Guidance*, *supra*. There is no need for a victimized employee to demonstrate, in addition, that the objectionable conduct would "affect seriously the psychological well-being of that reasonable person under like circumstances" or that the employee actually suffered psychological injury. Pet. App. A28-A29. That requirement is inconsistent with Title VII's function of ensuring equal employment opportunity.⁹

1. The Sixth Circuit's requirement that a plaintiff alleging hostile environment sexual harassment must demonstrate "psychological" effects has its origin in the Eleventh Circuit's decision in *Henson v. Dundee*, *supra*, which in turn relied on the Fifth Circuit's decision in *Rogers v. EEOC*, *supra*. The *Rogers* decision, which this Court cited in *Vinson*, involved racial discrimination. The plaintiff, a Spanish surnamed employee of an optometric practice, filed a complaint with the EEOC alleging that her employer segregated patients by race. 454 F.2d at 236. The EEOC sought access to the employer's

⁹ The courts of appeals have divided on the question. The Ninth Circuit has refused to require that a Title VII plaintiff must demonstrate "psychological" effects to obtain equitable relief for hostile environment sexual harassment. See *Ellison v. Brady*, 924 F.2d 872, 878 (1991). The Third and Eighth Circuits have not expressly addressed the question, but they have not required such a showing. See *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990); *Burns v. McGregor Electronic Indus., Inc.*, 955 F.2d 559 (8th Cir. 1992). The Sixth, Seventh, and Eleventh Circuits, however, have suggested that a plaintiff must show "psychological" effects. *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987); *Brooms v. Regal Tube Co.*, 881 F.2d 412, 418-420 (7th Cir. 1989); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1561 (11th Cir. 1987).

patient applications, and the employer questioned whether the allegations would constitute an unlawful employment practice subject to the EEOC's investigative authority. *Id.* at 237. The Fifth Circuit concluded that a segregative practice could be "so offensive to [the employee's] sensibilities" that it would constitute an unlawful employment practice in violation of Title VII. *Ibid.*

The Fifth Circuit reasoned that Title VII's broadly worded prohibition on discrimination in "terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1), "sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination." 454 F.2d at 238. The court observed that it could "readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers." *Ibid.* The Fifth Circuit's reference to "psychological" effects simply described the possible consequences of a hostile work environment; it was not meant to set forth a restrictive test for determining whether a hostile environment exists. See *Ellison v. Brady*, 924 F.2d 872, 878 n.8 (9th Cir. 1991).

Nevertheless, the Eleventh Circuit used the descriptive language from *Rogers* to establish the standard for proving a Title VII hostile environment sexual harassment claim. See *Henson v. Dundee*, 682 F.2d at 904. The Eleventh Circuit correctly observed that not every discriminatory slight affects employment conditions "to a sufficiently significant degree to violate Title VII." *Ibid.*, citing *Rogers*, 454 F.2d at 238. But the court went astray in formulating a standard to distinguish between actionable and non-actionable harassment. The Eleventh Circuit mistakenly relied on *Rogers'* descriptive reference to "psychological" effects and stated that the relevant inquiry was "[w]hether sexual harassment at the workplace is sufficiently severe and persistent to affect

seriously the psychological well being of employees." *Ibid.*

The Sixth Circuit has adopted the *Henson* formula, but with the added proviso that the plaintiff must satisfy both an objective "reasonable person" test and a subjective "actual offense" test. As the magistrate explained, the Sixth Circuit's test inquires whether the objectionable conduct is

"conduct which would interfere with that hypothetical reasonable individual's work performance and affect seriously the psychological well-being of that reasonable person under like circumstances."

Id. at A28-A29, emphasis added, quoting *Rabidue v. Osceola Refining Co.*, 805 F.2d at 620. Once the employee has met that test, "the particular plaintiff would nevertheless also be required to demonstrate that she was actually offended by the defendant's conduct and that she suffered some degree of injury as a result of the abusive and hostile work environment." 805 F.2d at 620. Although the Sixth Circuit stated that it had "considered the EEOC guidelines" and "canvassed existing legal precedent," it cited no direct authority for its approach. *Id.* at 619. The Seventh Circuit has followed the Sixth Circuit's approach. *Brooms v. Regal Tube Co.*, 881 F.2d 412, 418-420 (1989). See also *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1561 (11th Cir. 1987) (applying the *Henson* test).

2. The Sixth, Seventh, and Eleventh Circuits are mistaken in requiring a Title VII plaintiff to show "psychological" effects to prove hostile environment sexual harassment. By its terms, Title VII requires no inquiry into the "psychological well-being" of employees. As the Court noted in *Vinson*, Title VII prohibits discrimination with respect to "terms, conditions, or privileges of employment." See 477 U.S. at 65-67. Hostile environment sexual harassment is actionable under Title VII precisely because, and only to the extent that, it substantially af-

fects those terms, conditions, or privileges. *Id.* at 67. To be sure, sexual harassment—particularly harassment that is offensive, humiliating, or degrading—may have emotional consequences and can even injure an employee's "psychological well-being." But those emotional and psychological effects are not the *sine qua non* of a Title VII claim. Rather, sexual harassment violates Title VII if it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Vinson*, 477 U.S. at 67.

As this Court recognized in *Vinson*, "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII." 477 U.S. at 67. The Sixth, Seventh, and Eleventh Circuits adopted their "psychological effects" tests to distinguish instances of non-actionable sexual conduct, such as the isolated utterance of an epithet that offends an employee but "would not affect the conditions of employment to [a] sufficiently significant degree to violate Title VII." *Ibid.* Courts, however, should make those distinctions by directly inquiring whether the plaintiff has been denied equal employment opportunity.

The issue in a Title VII case is whether the employer has maintained a discriminatory working environment, not whether the employer has inflicted emotional distress. See *King v. Board of Regents*, 898 F.2d 533, 537 (7th Cir. 1990) (conduct may be actionable if it "den[ies] the plaintiff the right to participate in the work place on [an] equal footing with others similarly situated") (internal quotation marks omitted). A court can evaluate whether sexual harassment substantially affects the work environment without conducting an inquiry into "psychological effects," which do not in any event have controlling significance. As the Ninth Circuit has pointed out:

Conduct can unreasonably interfere with work performance without causing debilitation and without

seriously affecting an employee's psychological well-being.

Ellison v. Brady, 924 F.2d 872, 878 n.8 (1991).

The standard that we have articulated—whether the objectionable conduct would interfere with a reasonable victim's job performance, pp. 9-14, *supra*—properly focuses the inquiry on the equal employment opportunity concerns that are central to Title VII. There is no need to conduct an additional and ultimately intractable inquiry into objective or subjective psychological effects. Under the common sense principle of Occam's razor, the legal standard should not be made more complicated than is necessary to implement the statute.

Significantly, the courts of appeals have found no need to evaluate specific "psychological" effects in resolving other types of Title VII hostile environment claims. For example, the Sixth Circuit has stated that to prove hostile environment racial harassment, "[t]he employee need only show that the harassment made it more difficult to do the job." *Davis v. Monsanto Chemical Co.*, 858 F.2d 345, 349 (1988), cert. denied, 490 U.S. 1110 (1989). The court held that *Rabidue's* "psychological effects" standard applied only to sexual harassment claims and that an earlier case, *Erebia v. Chrysler Plastic Products Corp.*, 772 F.2d 1250 (6th Cir. 1985), cert. denied, 475 U.S. 1015 (1986), "remains the controlling law for racially hostile work environment claims in this circuit." *Davis*, 858 F.2d at 348 (footnote omitted).¹⁰

¹⁰ In *Erebia*, the court held that evidence of ethnic slurs and insubordination directed at a Mexican American supervisor by his subordinates was sufficient to support a finding of hostile work environment in violation of Title VII and 42 U.S.C. 1981. See *Erebia*, 772 F.2d at 1256. The plaintiff in *Erebia* testified that employees under his supervision called him a "wet bag [*sic*], tomato picker," told him to "go back to Mexico, there was some white person that could be doing my job instead of a Mexican," and refused to follow his instructions because "I was a Mexican and he was white." *Id.* at 1252. When *Erebia* complained to the

The "psychological effects" requirement is not only unnecessary, but it also misdirects the inquiry in a way that undermines Title VII's prohibitions on discrimination in employment. As the Ninth Circuit explained in *Ellison v. Brady*, *supra*:

Surely, employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation. *Accord* [EEOC Guidance, 8 F.E.P. Manual (BNA) at 405.6690 n.20]. Although an isolated epithet by itself fails to support a cause of action for a hostile environment, Title VII's protection of employees from sex discrimination comes into play long before the point where victims of sexual harassment require psychiatric assistance.

924 F.2d at 878. Specifically, an employee suffers unlawful discrimination in employment—and is therefore entitled to equitable relief under Title VII—if the employee can demonstrate objectionable sex-based conduct that is sufficiently severe or pervasive to interfere with a reasonable person's job performance vis-à-vis other employees who are not subjected to the offensive conduct.

As the Ninth Circuit recognized, the problem with the "psychological effects" test is not merely theoretical. See *Ellison*, 924 F.2d at 877-878. That test has resulted in dismissal of Title VII suits alleging conduct that might otherwise support a hostile environment sexual harassment claim. For example, the Sixth Circuit employed that test in *Rabidue v. Osceola Refining Co.*, *supra*, to reject the hostile environment claim of a female employee who faced daily exposure in common work areas to posters of nude or scantily dressed women and who complained of a co-worker who routinely referred to women as "whores," "cunt," "pussy," and "tits." See 805 F.2d

personnel manager, he was called a "hot headed Mexican" and was told to ignore the offensive remarks. *Ibid.*

at 615 (majority opinion); *id.* at 623-624 (Keith, J., dissenting in part).¹¹

The Sixth Circuit held that the co-worker's "obscenities, although annoying, were not so startling as to have affected seriously the psyches of the plaintiff or other female employees." 805 F.2d at 622. In that court's view, the plaintiff's right to relief must be "considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica" in the media and "in other public places." *Ibid.* The EEOC has specifically criticized that decision. See EEOC Guidance, 8 F.E.P. Manual (BNA) at 405:6690 & n.20.¹²

¹¹ The offending employee, who occupied a supervisory position, also directed vulgar remarks toward the plaintiff, calling her "fat ass" and suggesting that "[a]ll that bitch needs is a good lay." 805 F.2d at 623-624. Management was unresponsive to the complaints of the plaintiff and other female workers that the posters were offensive and that the employee's vulgarities "greatly disturbed" them. *Id.* at 624.

¹² The Eleventh Circuit has attempted to mitigate the effect of the "psychological effects" test by applying that test less stringently than it has been applied in the Sixth Circuit. For example, the Eleventh Circuit stated in *Walker v. Ford Motor Co.*, 684 F.2d 1355 (1982), a racial discrimination case, that the "repeated," "continuous," and "prolonged" use of "racially abusive language," such as calling poorly repaired cars "nigger-rigged" and referring to the car salesman with the lowest sales volume as "the black ass," was sufficient to establish a hostile work environment. *Id.* at 1358-1359. The trial court's finding that the offensive comments made the African American plaintiff "feel unwanted and uncomfortable in his surroundings" satisfied the "psychological effects" standard that the Eleventh Circuit adopted in *Henson*. *Id.* at 1359. The sexually demeaning statements that were allegedly made in *Rabidue*, however, are no less offensive than the racially demeaning statements in *Walker*. The different results in those cases suggest that a "psychological effects" standard would not produce more consistent or rational results than looking solely to whether the objectionable conduct would interfere with a reasonable employee's job performance.

The vice of the "psychological effects" test is that it withholds Title VII relief from victims of sex-based conduct that profoundly affects the conditions of the victim's employment, as long as the conduct is not found to be psychologically debilitating. Under the subjective element of the test, an employee who is emotionally capable of withstanding sexually offensive conduct would be required to tolerate patently discriminatory behavior unless and until the employee actually suffered psychological trauma. Title VII, which has as its goal equal employment opportunity, should not be construed to require that unduly high threshold showing for obtaining relief from discrimination.¹³

C. The Court Of Appeals' Judgment Should Be Vacated And The Case Should Be Remanded For Reconsideration Under The Proper Standard

The court of appeals and the district court both endorsed the magistrate's use of the "psychological effects" test to dismiss petitioner's hostile environment sexual harassment claim. Because the decision in this case rests on application of an incorrect legal standard, the decision should be vacated and the case remanded for reconsideration in light of the correct standard. Cf. *United States v. Fordice*, 112 S. Ct. 2727 (1992).

1. Forklift Systems is directly accountable for the discriminatory conduct of its president, Charles Hardy. Pet. App. A30-A31. The magistrate found that Hardy "demeans the female employees at his work place," *id.*

¹³ Although evidence of psychological harm or emotional distress is not necessary to establish a Title VII claim for equitable relief, a plaintiff could conceivably use it as evidence that the offensive conduct would interfere with the job performance of a reasonable person. Additionally, the evidence may be relevant in an action to recover damages for emotional injury under the Civil Rights Act of 1991, which allows recovery of compensatory and punitive damages for intentional discrimination in violation of Title VII. See 42 U.S.C. 1981a(b) (Supp. III 1991). Petitioner's suit in this case, however, seeks only equitable relief.

at A24, and that Hardy's conduct "would offend the reasonable woman," *id.* at A33. The workplace conduct that concededly occurred in this case could result in hostile environment sexual harassment, provided that the conduct was sufficiently pervasive in the workplace. For example, the EEOC has specifically identified sex-based derogation, which is reflected in Hardy's statements that "You're a woman, what do you know," "You're a dumb ass woman," and "We need a man as the rental manager," *id.* at A13, A33, as conduct that may give rise to Title VII liability if "it is 'sufficiently patterned or pervasive.'" *EEOC Guidance*, 8 F.E.P. Manual (BNA) at 405:6692, citing *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987).

Hardy's sexually suggestive conduct may also provide a potential basis for Title VII liability. The magistrate characterized "Hardy's wisecracks about females' clothes and anatomy" and Hardy's "coin dropping and coin-in-the-pocket tricks" as "merely inane and adolescent." Pet. App. A32. But the fact that Forklift Systems' president is crude, is immature, and has "a bad sense of humor," *ibid.*, does not insulate the company from Title VII's prohibition of hostile environment sexual harassment. Sexually offensive conduct that selectively demeans and humiliates women in the workplace can impair a reasonable female employee's job performance, even if other people consider the conduct as "harmless or insignificant." *EEOC Guidance*, 8 F.E.P. Manual (BNA) at 405:6690.

The magistrate discounted the significance of Hardy's sexually oriented conduct, stating that "the degree of sexual hostility that existed in [petitioner's] work environment was comparable to that in *Rabidue*." Pet. App. A37. As we have explained, however, the Sixth Circuit's decision in *Rabidue* is a dubious benchmark for measuring a nondiscriminatory work environment. See pp. 20-21, *supra*. The *Rabidue* court concluded that demeaning sexual conduct may be justified based upon "the lexicon of obscenity that pervaded the environment of the work-

place both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment." 805 F.2d at 620. The EEOC has criticized that approach, *EEOC Guidance*, 8 F.E.P. Manual (BNA) at 405:6690, and other courts of appeals have refused to follow it.¹⁴

The magistrate was constrained by *Rabidue* in analyzing the effects of Hardy's conduct in the workplace. For

¹⁴ The Third Circuit stated in *Andrews v. City of Philadelphia*, 895 F.2d 1469 (1990), that "pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally may serve as evidence of a hostile environment," as might "the posting of pornographic pictures in common areas and in the plaintiffs' personal work spaces." *Id.* at 1485. "Obscene language and pornography quite possibly could be regarded as 'highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity and without the barrier of sexual differentiation and abuse.'" *Id.* at 1485-1486, quoting *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988), cert. denied, 489 U.S. 1020 (1989). Similarly, the Fourth Circuit concluded in *Katz v. Dole*, 709 F.2d 251 (1983), that a female plaintiff who was exposed to a workplace "pervaded with sexual slur, insult and innuendo" and was "personally the object of verbal sexual harassment" that "took the form of extremely vulgar and offensive sexually related epithets addressed to and employed about" her, had adequately established the existence of a hostile work environment. *Id.* at 254, 256. See also *Ways v. City of Lincoln*, 871 F.2d 750, 753-755 (8th Cir. 1989) (evidence of racially offensive slurs, jokes, comments, and cartoons occurring on an ongoing basis was sufficient to establish a hostile work environment under Title VII); *Barbetta v. Chemlawn Services Corp.*, 669 F. Supp. 569, 572-573 (W.D.N.Y. 1987) (allegations of pornographic magazines in workplace, vulgar comments by co-workers and supervisors, requirement that female employees wear skirts or dresses on certain occasions because visiting supervisor liked to look at legs, and unwanted physical contact of a sexual nature by male employee were adequate to state claim for hostile environment sexual harassment; proliferation of pornographic material in workplace "may be found to create an atmosphere in which women are viewed as men's sexual playthings rather than as their equal co-workers").

example, the magistrate apparently reasoned, from his finding that Hardy's conduct would not affect petitioner's psychological well-being," that the conduct would not interfere with a reasonable woman manager's work performance:

I believe that some of Hardy's inappropriate sexual comments, especially this last one [suggesting that petitioner promised sexual favors to a customer to secure an account] offended [petitioner], and would offend the reasonable woman. However, I do not believe they were so severe as to be expected to seriously affect [petitioner's] psychological well-being. A reasonable woman manager under like circumstances would have been offended by Hardy, but his conduct would not have risen to the level of interfering with that person's work performance.

Pet. App. A33-A34. The magistrate's conclusion does not necessarily follow. A sexually demeaning work environment can interfere with a reasonable woman manager's work performance—regardless of psychological injury—if the environment hampers her opportunity to succeed vis-à-vis her male peers or denies her credit for her achievements. Sexually offensive conduct—such as Hardy's suggestion in the presence of other Forklift Systems employees that petitioner promised a customer "some 'bugger'" to secure an account, Pet. App. A17—can have both effects by degrading the manager in the eyes of her subordinates and by denying her credit for accomplishments achieved through superior effort or skill.

2. The magistrate concluded that petitioner's allegations presented a "close case" even under the *Rabidue* standard. See Pet. App. A31. Accordingly, Hardy's conduct should be reconsidered in light of the correct legal standard. The focus on remand should be on whether the offensive conduct was sufficiently pervasive to create an abusive environment that would interfere with the job performance of a reasonable employee subjected to that abuse.

The EEOC has explained that a hostile environment claim "generally requires a showing of a pattern of offensive conduct." *EEOC Guidance*, 8 F.E.P. Manual (BNA) at 405:6690; see also *Andrews v. City of Philadelphia*, 895 F.2d at 1484 ("[h]arassment is pervasive when 'incidents of harassment occur either in concert or with regularity,'" quoting *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1189 (2d Cir. 1987)). The frequency or regularity of the conduct may counterbalance its lack of severity. See, e.g., *Ellison*, 924 F.2d at 878 ("the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct"); see also *EEOC Guidance*, 8 F.E.P. Manual (BNA) at 405:6690 ("the more severe the harassment, the less need to show a repetitive series of incidents").

The EEOC has also explained that the pervasiveness of the harassment must be determined "in light of 'the record as a whole' and 'the totality of [the] circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.'" See *Vinson*, 477 U.S. at 69, quoting 29 C.F.R. 1604.11(b). "Under the totality of the circumstances analysis, the district court should not carve the work environment into a series of discrete incidents and then measure the harm occurring in each episode." *Burns v. McGregor Electronic Indus., Inc.*, 955 F.2d 559, 564 (8th Cir. 1992). Each separate incident of harassment need not "be sufficiently severe to detrimentally affect a female employee," because it is the "overall scenario" rather than "individual incidents" that determines the existence of a hostile work environment. *Andrews*, 895 F.2d at 1484-1485.

The question whether sexual harassment is "pervasive" should be analyzed from the objective perspective of a reasonable person subject to the offensive conduct. In a society that values freedom of expression and diversity of thought, a reasonable person's job performance is not impaired by isolated remarks or trivial incidents. But when

discriminatory conduct is sufficiently pervasive or severe to deprive the reasonable person of equal employment opportunity, Title VII is implicated. The inquiry necessarily turns on an objective analysis of the facts of the particular case. The fact that a plaintiff's work performance subjectively suffered is not sufficient by itself to establish pervasive harassment. But the fact that a plaintiff's co-workers do not find the environment hostile is also not controlling, particularly where the co-workers have been "conditioned to accept denigrating treatment." Pet. App. A32.

3. The magistrate's determination that petitioner was unable to establish constructive discharge may also need to be reexamined on remand. The magistrate predicated his rejection of petitioner's constructive discharge claim on his conclusion that she had not shown hostile environment sexual harassment. Pet. App. A37-A38. If it is determined on remand that petitioner has demonstrated actionable sexual harassment, it will be necessary to reexamine whether the conditions at Forklift Systems were so intolerable that they "foreseeably would compel a reasonable employee to quit." *EEOC Guidance*, 8 F.E.P. Manual (BNA) at 405:6693.¹⁵

¹⁵ The EEOC considers the absence of "an effective internal grievance procedure" in the workplace to be an "important factor" in evaluating claims of constructive discharge resulting from sexual harassment. *EEOC Guidance*, 8 F.E.P. Manual (BNA) at 405:6693. Forklift Systems presented no evidence of an internal grievance procedure to address claims of sexual harassment. Petitioner complained to Hardy about his offensive behavior and threatened to resign, indicating that she found his conduct intolerable, and she decided to remain at Forklift Systems only when Hardy promised to stop the harassment. Pet. App. A16. When Hardy soon resumed his conduct with a "truly gross and offensive" remark, *id.* at A33, petitioner may reasonably have believed that she had no choice but to put up with the conduct or to leave Forklift Systems.

CONCLUSION

The judgment of the court of appeals should be vacated and the case should be remanded for further proceedings.

Respectfully submitted.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

TERESA HARRIS,

v.

Petitioner,

FORKLIFT SYSTEMS, INC.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE
EMPLOYMENT LAW CENTER, A PROJECT OF
THE LEGAL AID SOCIETY OF SAN FRANCISCO,
THE CALIFORNIA WOMEN'S LAW CENTER, AND
EQUAL RIGHTS ADVOCATES, INC.
IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is a plaintiff in a sexual harassment case also required to prove, in order to prevail, that she suffered severe psychological injury when the Trial Court has found that she was offended by conduct that would have offended a reasonable victim in the position of the plaintiff?

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IN SUPPORT OF PETITIONER**

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae listed below file this brief in support of Petitioner Teresa Harris. Both parties have consented to the submission of this brief.

The EMPLOYMENT LAW CENTER (ELC), a project of the Legal Aid Society of San Francisco, is a private, non-profit, public interest law firm which represents indigent workers in cases involving employment

discrimination and workplace rights. The ELC specializes in, among other areas of the law, sex discrimination.

The ELC was counsel of record for Katherine Vinson in *Vinson v. Superior Court*, 43 Cal.3d 833, 239 Cal. Rptr. 292 (1987), in which the California Supreme Court ruled that a mental examination is not warranted in a simple sexual harassment case where the claimant seeks compensation for having to endure an oppressive work environment or for wages lost following an unjust dismissal.

Prior to the *Vinson* case, the ELC was counsel of record in *Priest v. Rotary*, 98 F.R.D. 755 (N.D. Cal. 1983), a sexual harassment case in which the Court denied discovery of detailed information about plaintiff's sexual history, including the name of each person with whom she had sexual relations in the ten years prior to the defendants' discovery request.

The ELC represented Lillian Garland in *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), which upheld California Government Code Section 12945(b)(2), a state law which provides up to four months of pregnancy disability leave and a right to return to the same or similar job.

The ELC also represented Queen Foster in *Johnson Controls, Inc. v. Fair Employment & Housing Commission*, 218 Cal.App.3d 517, 167 Cal.Rptr. 158 (1990), where the California Court of Appeal ruled that the employer's gender-based exclusionary "fetal protection" policy violated the Fair Employment and Housing Act. The ELC also appeared as *amicus curiae* in the United States Supreme Court in *International Union, UAW v. Johnson Controls*, — U.S. —, 111 S.Ct. 1196 (1991), in which the Court held that the employer's "fetal protection" policy constituted sex discrimination prohibited by Title VII of the Civil Rights Act of 1964.

The ELC has participated as *amicus curiae* in many discrimination cases before the United States Supreme Court, including *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Wygant v. Jackson Bd. of Education*, 476 U.S. 267 (1986), *reh. den.* 478 U.S. 1014 (1986).

EQUAL RIGHTS ADVOCATES, INC. (ERA) is a San Francisco-based public interest legal and educational corporation dedicated to working through the legal system to secure equality for women. ERA has a twenty year history of representing the interests of working women in the courts, legislatures, and public education campaigns.

Since its early days, ERA has worked to end sexual harassment both through litigation and public policy initiatives. ERA represented plaintiff in the first case in the Ninth Circuit to find sexual harassment a violation of Title VII (*Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979)). Even prior to that, ERA had appeared as *amicus curiae* in sexual harassment cases (e.g., *Tomkins v. Public Service Electric and Gas Co.*, 568 F.2d 1044 (3rd Cir. 1977)).

The law firm has continued its efforts to eradicate sexual harassment from the work place. ERA represents individual plaintiffs in sexual harassment cases (e.g., *Colombano v. City and County of San Francisco*, Superior Court No. 838-649—woman police officer harassment case resulting in a settlement worth over \$800,000). It has appeared before this Court as *amicus curiae* in cases involving sexual harassment issues (*Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)) and in numerous lower court cases where various issues concerning sexual harassment have arisen.

In addition, ERA advises hundreds of women each year through its advice and counseling "hot line" regarding their legal right to be free from this invidious form of discrimination. The firm also provides technical assistance to scores of attorneys each year who are represent-

ing clients with sexual harassment claims. ERA has appeared before this Court as *amicus curiae* in dozens of sex and race discrimination cases interpreting Title VII and other anti-discrimination laws.

The CALIFORNIA WOMEN'S LAW CENTER was established in 1989 as the first Law Center in Southern California solely devoted to addressing the civil rights of women and girls. The Law Center has identified the following priorities for its work: Sex Discrimination in Employment, Sex Discrimination in Education, Reproductive Rights, Family Law, Domestic Violence and Child Care.

The Law Center's primary efforts in addressing these priorities emphasize support and technical and legal assistance to legal services agencies, community-based organizations, attorneys and policymakers.

Sex discrimination is clearly within the priority concerns of the Law Center. Therefore, the CALIFORNIA WOMEN'S LAW CENTER not only has a significant interest in the issues before the court, but has extensive background and expertise in the issues presented to the court in this appeal.

Amici believe that this Court's opinion in this case will set important precedent for the enforcement of Title VII of the Civil Rights Act of 1964, in the context of hostile work environment sexual harassment cases.

SUMMARY OF ARGUMENT

A requirement that a plaintiff prove "severe psychological damage" in order to establish liability in a hostile work environment sexual harassment case is contrary to this Court's prior holding in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). Moreover, imposing such a requirement would contravene the purposes of Title VII.

Amici respectfully submit that the proper inquiry for determining whether conduct is sufficiently "severe or

pervasive" to give rise to Title VII liability is to examine the harassing conduct complained of, not the plaintiff's response to it, from the perspective of a reasonable person of the same gender as the plaintiff. Adopting a gender-conscious perspective is essential to eradicating stereotyped notions and prevailing prejudices about women and eliminating all barriers to true equality in the workplace.

ARGUMENT

I. A REQUIREMENT OF "SEVERE PSYCHOLOGICAL DAMAGE" IN SEXUAL HARASSMENT CASES IS CONTRARY TO *VINSON* AND THE PURPOSES OF TITLE VII.

The question presented to the Court by this case is a narrow one: "Is a plaintiff in a sexual harassment case required to prove that she suffered severe psychological injury in order to establish the defendant's liability?" This Court's precedent mandates that the answer to that question is "no."

In the landmark case of *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), this Court first recognized that a claim of hostile environment sexual harassment is actionable under Title VII of the 1964 Civil Rights Act. This Court rejected the argument that a violation of Title VII occurs only where the plaintiff can show "economic" or "tangible loss," finding Congress' intent was "to strike at the entire spectrum of disparate treatment of men and women." *Id.* at 64 (citations omitted). Recognizing that conduct "which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality" that racial harassment is to racial equality, this Court held that sexual harassment which is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment,'" is forbidden under Title VII, whether or not a tangible loss results. *Id.* at 67.

Vinson clearly stated that a hostile environment sexual harassment claim, to be successful, need not entail economic harm or other tangible discrimination; therefore, a plaintiff cannot be required to prove that she suffered severe psychological injury in order to prevail on such a claim. To require a demonstration of tangible harm at the liability stage is contrary to the plain language of this Court's unanimous opinion in *Vinson*. "Conduct can unreasonably interfere with work performance without causing debilitation and without seriously affecting an employee's psychological well-being." *Ellison v. Brady*, 924 F.2d 872, 878, n.8 (9th Cir. 1991).¹

Requiring a plaintiff to demonstrate "severe psychological injury" in order to prove the existence of a hostile work environment is not only contrary to *Vinson*, it would also undermine the strong public policies underlying Title VII. Victims of sexual harassment would be forced to endure demeaning and degrading treatment long enough to sustain psychological injuries before they could take legal action to enjoin the harassing conduct. Employers would be shielded from liability for conduct which

¹ The *Ellison* court aptly notes the source of confusion which led the courts in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041, and *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210 (7th Cir. 1986), mistakenly to require severe psychological harm. The courts in *Rabidue* and *Sears* misconstrued a citation in *Vinson* (*Vinson* at 66) from *Rogers v. E.E.O.C.*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), in which the *Rogers* court contemplates a working environment "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers." As the *Ellison* court recognized, "[t]he *Rogers* court did not hold that a hostile environment only exists when the emotional and psychological stability of workers is completely destroyed." *Ellison* at 878, n.8 (emphasis in original). Requiring plaintiffs to show severe psychological damage as an element of plaintiff's case on this erroneous reading of *Vinson* in the *Rabidue* and *Sears* cases would create an altogether new and unprecedented element in sexual harassment law and compound *Rabidue* and *Sears*' defective legal analysis.

is "every bit the arbitrary barrier to sexual equality" at the workplace, when an employee understandably chose to leave a sexually hostile workplace before her psychological health was damaged. The myriad ways in which a requirement of "severe psychological injury" would thwart Title VII's goal of eliminating barriers to equal opportunity in the workplace are more fully discussed by other *amici* on behalf of petitioner and need not be repeated here.

In addition to undermining the goals of Title VII, a requirement of "severe psychological injury" also introduces a highly subjective and individualized element into the analysis which will make it difficult for employers to recognize and eliminate sexual harassment in their workplaces. Individual women may have widely differing psychological responses to the exact same conduct. The same behavior may cause psychological damage to one woman, while another feels offended, but is not psychologically injured. Without a clear standard employers are unable to determine what conduct is "severe or pervasive" enough to create a hostile work environment and to act affirmatively to ensure that such behavior stops. Where the harassing conduct complained of is exactly the same, there is no reason to find liability in one case and not another, simply because different individuals may be affected to different degrees.

An analysis of the degree of harm suffered as a result of the harassment may, of course, be relevant to determine the amount of damages. However, it is irrelevant to the determination of liability, and contravenes the language of *Vinson* when used for that purpose. Rather, a finding of hostile work environment sexual harassment should rest on an evaluation of the *conduct* of the defendant, *not* the effect it may have on a particular individual plaintiff.

The proper inquiry, as mandated by *Vinson*, is whether that conduct is sufficiently "severe or pervasive" to affect

the terms and conditions of employment and create an abusive working environment. The degree of the psychological effect on the plaintiff simply has no part in this analysis. In answering the narrow question presented by this case, this Court need not look beyond the standard articulated in *Vinson*. If, however, any further explication of what constitutes a "hostile or abusive working environment" is necessary, this Court should follow the great weight of appellate court opinion, which has held that the harasser's conduct should be evaluated from the perspective of a reasonable person of the same gender as the plaintiff.

II. THE EXISTENCE OF A HOSTILE WORK ENVIRONMENT SHOULD BE DETERMINED BY AN OBJECTIVE EVALUATION OF THE HARASSER'S CONDUCT.

A. The Leading Cases Of *Andrews* And *Ellison* Articulate A Clear Formulation Of This Objective Inquiry.

Andrews v. City of Philadelphia, 895 F.2d 1469 (3rd Cir. 1990), provides a straightforward and often-cited statement that the perspective of "a reasonable person of the same sex" as the plaintiff should be used in analyzing the employer's conduct.² *Id.* at 1482. The court emphasized that this is an objective inquiry, and that "it is here that the finder of fact must actually determine whether the work environment is sexually hostile." *Id.* at 1483. "[This] objective standard protects the employer from the 'hypersensitive' employee, but still serves the goal of equal opportunity by removing the walls of

² *Andrews* goes beyond *Vinson* in that it sets out a rigid five-part test plaintiffs are required to meet before prevailing in a hostile work environment claim. Three of the five *Andrews* requirements relate to standing. *Amici curiae* take exception to these requirements to the extent that they go beyond the Court's requirements in *Vinson* regarding a hostile work environment.

discrimination that deprive women of self-respecting employment." *Id.* at 1483.

Following the lead in *Andrews*, the Ninth Circuit Court of Appeals in *Ellison*, *supra*, articulates a similarly practical and fair standard for evaluating whether an employer's conduct is sufficiently severe or pervasive to alter the terms and conditions of employment. After rejecting *Rabidue's* requirement that plaintiffs show that their psychological well-being is "seriously affected," the *Ellison* court offers a sound framework for the inquiry mandated by *Vinson*: a female plaintiff states a case of hostile environment sexual harassment when she alleges "conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." *Ellison*, 924 F.2d at 879. In determining whether sexual harassment is sufficiently severe or pervasive to be actionable, the fact-finder should "analyze the harassment from the victim's perspective." *Id.* at 878.

Like the analysis set out in *Andrews*, the *Ellison* court's "reasonable woman" standard contemplates an objective standard for determining whether the severe or pervasive requirement has been satisfied. This standard "shield[s] employers from having to accommodate the idiosyncratic concerns of the rare hyper-sensitive employee." *Ellison*, 924 F.2d at 879. At the same time, adopting the perspective of a "reasonable woman," rather than the perspective of the alleged harasser, avoids the risk of "reinforcing the prevailing level of discrimination." *Id.* at 878.

The *Ellison* formulation of this objective requirement is squarely in accord with *Andrews*. While *Ellison* speaks of the "reasonable woman," this standard is simply the application of the "reasonable victim" standard to that particular case, where the plaintiff was a woman. The *Ellison* court noted that "where male employees allege

that co-workers engage in conduct which creates a hostile environment, the appropriate victim's perspective would be that of a reasonable man." *Id.* at 879, n.11. Thus, the *Ellison* "reasonable woman" test is substantively identical to the *Andrews* court's "reasonable person of the same sex" standard for purposes of determining liability in a hostile work environment sexual harassment case.

B. A Standard Which Takes Into Account The Perspective Of The Plaintiff Is Essential To Eradicating Sexual Harassment In The Workplace.

Although the "reasonable woman" or "reasonable victim" standard takes into account the perspective of the plaintiff, it should not be confused with the "reasonable person" standard used in traditional tort analysis. The purpose of this objective standard in sexual harassment cases is *not* to judge the reasonableness of the response of the particular woman, but to *evaluate the conduct of the harasser*. Properly used, the *Andrews/Ellison* standard focuses attention solely on the harasser's actions. It is used to "determine whether the work environment is sexually hostile" as a result of the harassing conduct. *Andrews*, 895 F.2d at 1483. This determination is made without any reference to the "reasonableness" of the response by the particular individual affected. By focusing on the defendant's conduct, this standard advances Title VII's goal of "prevent[ing] the perpetuation of stereotypes and a sense of degradation which serves to close or discourage employment opportunities for women." *Andrews*, 895 F.2d at 1483.

The "reasonable woman" standard also differs from the traditional "reasonable person" test in that it recognizes and takes into account the differing experiences of men and women. The *Ellison* and *Andrews* courts recognized that a "sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women." *Ellison* at 879. The differences

in the historical and cultural experiences between men and women are significant and numerous. An obvious example, on which the *Ellison* court focused, is the disparity in the rates of sexual assaults against men and women. *Id.* at 879.

What makes sexual harassment more offensive, more debilitating, and more dehumanizing to its victims than any other form of discrimination is precisely the fact that it is sexual. Not only are men exercising power over women, but they are operating in a realm which is still judged according to a gender double standard, itself a reflection of the extent to which sexuality is used to penalize women. In my view, these cases are such a disaster in doctrinal terms precisely because, as with rape, they involve sex and sexuality. And yet however clear all that might be, the argument for treating these cases as violations of Title VII begins from the premise that the sexuality which lies at their core is legally invisible: They are simply cases of differential treatment based on gender. Estrich, *Sex at Work*, 43 Stan. L. Rev. 813, 819 (1991).

Acknowledging these differences is absolutely critical to understanding the principles underlying the "reasonable woman" standard for female plaintiffs. "A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women." *Ellison*, 924 F.2d at 878.

A gender-conscious standard like those of *Andrews* and *Ellison* acknowledges the social reality that sexual harassment in the American workplace is rampant and that women are disproportionately harmed by it.³ Only by

³ Estrich refers to a 1976 Redbook magazine questionnaire asking its readers "whether they had been subject to unwanted sexual 'attention' at work from male bosses or colleagues. 9 out of 10 women who responded said yes, and 75% called the advances embarrassing, demeaning, or intimidating." Estrich at 821. Estrich

employing a gender-conscious standard will the law reflect the fact that offensive and oppressive sexual harassment is part of the daily working environment of many women and ensure the removal of these barriers to sexual equality in the workplace.⁴

The "reasonable woman" is not any particular person, nor even the average of some group of actual persons. Rather, the "reasonable woman" is a theoretical construct which assists the trier of fact in taking into account the differing life experiences of men and women in this society as a whole when evaluating the conduct of an alleged harasser. The purpose of the "reasonable woman" standard is to make conscious the unconscious stereotypes and biases which might otherwise color an evaluation of what is or is not acceptable behavior in the workplace. It "discards the male-biased definition of acceptable be-

also cites to a "more scientific study by the federal government four years later, [wherein] 42% of the women respondents reported being subjected to some form of 'sexual harassment,' at an estimated cost to the federal government of \$189 million from 1978 to 1980. The harassment figures were roughly the same when the government resurveyed in 1987, but the costs over a two-year period rose to \$267 million. Smaller surveys during this period, sometimes phrased in terms of harassment or unwelcome advances, consistently found that anywhere from 36 to 53 percent of the women questioned identified themselves as victims." Estrich at 822 (citations omitted).

⁴ The decision of the Sixth Circuit in *Rabidue*, *supra*, demonstrates the dangers of omitting a gender-conscious perspective and relying solely on the purportedly neutral "reasonable person" standard in the context of sexual harassment cases. In *Rabidue*, the Court's use of a "reasonable person" standard permitted it to evaluate plaintiff's claims from the perspective of the male employees who dominated that work environment. It completely ignored the degrading effects of that environment on women. By a perversion of logic, the *Rabidue* court excused the sexual jokes, sexual conversations and pornography in the workplace because of their pervasiveness, rather than recognizing these conditions for what they are—a significant barrier to equality in the workplace.

havior and substitutes a viewpoint that acknowledges the effects of sexual harassment on women." Brenneman, *Comments: From a Woman's Point of View: The Use of the Reasonable Woman Standard in Sexual Harassment Cases*, 60 U. Cin. L. Rev. 1281, 1296 (1981).

Because the "reasonable woman" is a theoretical construct, not an empirical derivation, the particular responses of specific individuals cannot be used to define what is "reasonable." For example, the testimony of other women employees that they were not offended by the alleged harassment is largely irrelevant. These women may believe that they are unaffected by certain types of harassment because their indifference is a coping mechanism for dealing with the harassment, or because they have been conditioned to accept sexual stereotyping as a condition of employment, or simply because they are afraid of losing their jobs. The true test of "reasonableness" from this theoretical perspective is whether the conduct complained of operates as a barrier to the full participation of women in the workplace. Thus, for example, from this perspective, pornographic displays which undermine the legitimacy of women's presence in the workplace are seen as barriers to equal opportunity:

It is doubtful that a female worker can believe her male counterparts are taking her seriously when depicted on the wall behind her is a male using another woman's naked breast as a golf tee. The poster makes the statement that women are playthings. That message flows from the wall of the workplace into the heart of it. When women in the workforce are viewed as a sexual obsession, it can prevent men from taking them seriously, and can preclude women from being able to focus on their jobs. That is an obstacle to equal opportunity. That, to the reasonable woman, is sexual harassment. Brenneman at 1295.

As the *Ellison* court noted, "a gender-conscious examination of sexual harassment enables women to participate

in the workplace on an equal footing with men." 924 F.2d at 879.

If adopted by this Court, the *Andrews/Ellison* standard will encourage employers to view the conduct of their agents and supervisors through the eyes of the reasonable woman rather than through the rose colored lens of the seemingly well-intentioned "Cyrano de Bergerac," *Ellison*, 924 F.2d at 880, whose conduct nonetheless threatens, intimidates and offends his female co-workers. The "objective" or "reasonable" element protects the employer from the "hypersensitive employee," *Andrews*, 895 F.2d at 1483; *Ellison*, 924 F.2d at 879, while adopting the victim's perspective ensures that stereotyped notions or unconscious prejudices do not serve to reinforce rather than eliminate barriers to full equality in the workplace.⁵

The *Ellison* court clearly understood the ramifications of failing to adopt a gender-based perspective, noting that "Congress did not enact Title VII to codify prevailing sexist prejudices," *Id.* at 881, and that "[a]dopting the victim's perspective ensures that courts will not 'sustain ingrained notions of reasonable behavior fashioned by the offenders.'" *Id.* at 880-1, quoting *Rabidue*, 805 F.2d at 626 (Keith, J. dissenting).⁶ To reject a gender-

⁵ As the *Ellison* court noted, using the victim's perspective "does not establish a higher level of protection for women than men." *Id.* at 879. On the contrary, it affirms the simple notion that an employee of either gender should be protected from a work environment that a reasonable person of that gender would find hostile.

⁶ *Amici curiae* emphatically urge the Court to reject the reasoning embodied in the following passage from *Rabidue*: "Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this." 805 F.2d at 620. This position amounts to a complete abdication of the clear goal of Title VII: eradicating invidious employment discrimination. Failure to adopt a gender-based perspective will, as it did in *Rabidue*, freeze into place prevailing discriminatory attitudes, even where the conduct in question violates Title VII.

conscious standard is to effectively ignore the social and historical context of sexual harassment in this country and to trivialize the significance of this insidious form of gender discrimination.

C. A Majority Of Courts Have Adopted The Reasonable Woman Standard To Evaluate Employers' Conduct In Hostile Work Environment Cases.

The *Andrews/Ellison* standard has proven influential and workable. In the short period since these decisions have been published, courts have repeatedly followed these cases in analyzing hostile work environment claims from the perspective of a reasonable person of the same gender. Indeed, enough courts have followed *Andrews* and/or *Ellison* in sexual harassment hostile work environment cases to establish a near-consensus among the courts that have explicitly considered the perspective from which the defendant's conduct should be evaluated.

In addition to the Third⁷ and Ninth⁸ Circuits, courts in the Fourth, Sixth, Eighth, and Eleventh Circuits have employed the perspective of the reasonable person of the same gender as plaintiff in analyzing sex harassment hostile work environment claims.⁹ While the lan-

⁷ *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3rd Cir. 1990); *Smolsky v. Consolidated Rail*, 780 F. Supp. 283, 294 (E.D. Pa. 1991); *Garvey v. Dickinson College*, 775 F. Supp. 788, 800 (M.D. Pa. 1991).

⁸ *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Austen v. State of Hawaii*, 759 F. Supp. 612, 628 (D. Hawaii 1991).

⁹ See *Smolsky v. Consolidated Rail*, 780 F. Supp. 283, 294 (E.D. Pa. 1991) (perspective of "reasonable woman" used in sexual hostile work environment analysis); *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987) (perspective of "reasonable woman" used in analysis of sexual harassment allegations relevant to constructive discharge claim); *Jenson v. Eveleth Taconite*, 139 F.R.D. 657, 665 (D. Minn. 1991) (necessity of proof of work environment hostile to a "reasonable woman" held to be a common question of law for purposes of certification of a class of females); *Robinson v. Jack-*

guage varies slightly from circuit to circuit, the analysis is conceptually identical.

The few court opinions that still insist on using a "reasonable person" standard in sex harassment cases do not discuss the standard to be used, nor do they reject a victim-based perspective.¹⁰ There is no evidence from these opinions that these courts considered the perspective question when choosing their language. Therefore, courts that have considered this issue are nearly unanimous in analyzing employers' conduct from the perspective of a reasonable person of the same gender, as *Andrews* and *Ellison* did.

sonville Shipyards, 760 F. Supp. 1486, 1524 (M.D. Fla. 1991) (perspective of "reasonable woman" used in hostile work environment sexual harassment analysis); *Vermett v. Hough*, 627 F. Supp. 587, 607 (W.D. Mich. 1986) (court denies liability using "reasonable woman" standard); *Spencer v. General Electric*, 697 F. Supp. 204, 218-19 (E.D. Va. 1988), *aff'd* 894 F.2d 651 (4th Cir. 1990) (court uses "reasonable person", "reasonable employee in her situation", and "reasonable female employee" interchangeably); *Garvey v. Dickinson College*, 775 F. Supp. 788, 800 (M.D. Pa. 1991) (court uses "reasonable person of the same sex in that position" in hostile work environment sexual harassment case).

¹⁰ See, e.g. *Brooms v. Regal Tube*, 881 F.2d 412, 423 (7th Cir. 1989); *Burns v. McGregor Electronic Industries*, 955 F.2d 559, 566 (8th Cir. 1992); *Campbell v. Kansas State University*, 780 F. Supp. 755, 762 (D. Kan. 1991); *Caleshu v. Merrill Lynch*, 737 F. Supp. 1070, 1082 (E.D. Mo. 1990), *aff'd* 985 F.2d 564 (8th Cir.).

The only opinion that does analyze its choice of a standard and uses a "reasonable person" standard is *Trotta v. Mobil Oil*, 788 F. Supp. 1336 (S.D.N.Y. 1992). However, the court qualified its description of the standard so as to make its position functionally indistinguishable from *Andrews* and *Ellison* by noting that "[i]n applying a reasonable person standard, courts can take account of gender-based differences." *Id.* at 1350, n.1.

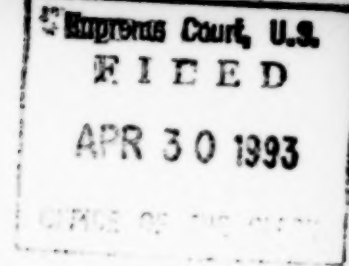
CONCLUSION

For all of the foregoing reasons, the Court should hold that a plaintiff in a Title VII hostile environment sexual harassment case is not required to prove severe psychological injury in order to prevail. Rather, the existence of a hostile work environment should be evaluated from the perspective of a reasonable person of the same gender as the plaintiff.¹¹

Respectfully submitted,

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No. 92-1168

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October Term, 1992

TERESA HARRIS,
Petitioner

v.

FORKLIFT SYSTEMS, INC.,
Respondent

**On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit**

**BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER
ON BEHALF OF NATIONAL CONFERENCE OF
WOMENS' BAR ASSOCIATIONS AND WOMEN'S BAR
ASSOCIATION OF THE DISTRICT OF COLUMBIA**

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INTEREST OF THE AMICI CURIAE

Amicus Curiae National Conference of Women's Bar Associations ("NCWBA") is a national non-profit professional organization of state, regional, and local women's bar associations in 47 states and the District of Columbia. Its goals are to promote the advancement of women in the profession of law, to enhance the professional lives of women lawyers, and to advance issues of interest to women and the profession. NCWBA is an affiliate of the American Bar Association ("ABA"), and works closely with the ABA's Commission on the Status of Women in the Profession to further these goals.

Amicus Curiae Women's Bar Association of the District of Columbia ("DCWBA") is a membership organization of nearly 2000 judges, lawyers and law students in private and government practice throughout the District of Columbia metropolitan area. Founded in 1917, it is one of the oldest,

largest, most active women's bar associations in the country.

DCWBA is a constituent member of NCWBA.

Numerous studies conducted by these organizations over the last decade show that sexual harassment persists as a major barrier to women in the legal profession. These studies, which we wish to present to the Court, demonstrate that unwelcome and offensive sex-based conduct in the workplace causes substantial damage to women lawyers' self-respect, credibility, professional reputation, and ability to realize their professional potential even when it does not result in serious psychological injury. The court below was wrong to deprive the victims of such conduct of the protections of Title VII.

STATEMENT OF THE CASE

This case is on writ of certiorari from the Sixth Circuit. The petitioner, Teresa Harris, was employed as respondent's rental manager from April 1985 until October 1987. The respondent, Forklift Systems, Inc., is a Tennes-

see corporation that sells, leases and repairs forklift machines. Petitioner was the only female of six managers other than the daughter of Forklift's president, Charles Hardy.

Hardy engaged in a course of sexually abusive and demeaning conduct toward petitioner during her employment. He said to her on a number of occasions in the presence of other employees: "you're a woman, what do you know" and "we need a man as the rental manager." He also publicly referred to her as "a dumb ass woman." He directed her to bring coffee into a manager's meeting at least once, a request not made to male managers. He asked Harris and other female employees, but not male employees, to retrieve coins from his front pants pocket. He also threw objects on the ground in front of Harris and other female employees, but not male employees, and asked them to pick up the objects. He made sexual comments about the clothing worn by Harris and other female employees, but not by male employees.

In August, 1987, after Harris had begun experiencing anxiety and emotional upset, she met with Hardy, complained about his behavior, and asked him to stop. Hardy stated that he had been only "joking," apologized and promised to change. Nevertheless, he soon began the same behavior again and, in mid September 1987, in front of other employees, stated that Harris had promised sexual favors to secure an account from a client. Harris then left her job.

On July 7, 1989, Harris filed a complaint for damages and injunctive relief under Title VII of the Civil Rights Act, 42 U.S.C. §2000e, in the United States District Court for the Middle District of Tennessee, alleging that she had been constructively discharged because of the sexually hostile work environment created by Charles Hardy. At trial, Hardy never denied any of his actions, defending them as merely "jokes." The United States Magistrate who tried the case found that Hardy's behavior was crude and vulgar and would have offended a reasonable female manager. Never-

theless, he issued a report and recommendation for dismissal of Harris's claim because he found that she had not suffered serious psychological injury. After the District Court adopted the report and recommendation of the magistrate and dismissed the case, petitioner appealed to the Sixth Circuit, which affirmed without opinion. *Harris v. Forklift Systems, Inc.*, 976 F.2d 733 (6th Cir. 1992).

SUMMARY OF ARGUMENT

It might be expected that women in the professional legal workplace are unlikely to face the sexually abusive and demeaning treatment meted out to the petitioner here, including publicly describing her as "a dumb ass woman." Unfortunately, that is not so. Sexual harassment persists as a major barrier to equal employment opportunity for women lawyers. The great majority of women lawyers have experienced or observed such conduct.

NCWBA member organizations, including DCWBA, have been active participants, over the last decade, in numerous gender bias studies documenting the deleterious effects to women lawyers of such treatment in the courts and other legal workplaces. These studies show that the sexually harassing conduct suffered by the petitioner here -- the "discriminatory intimidation, ridicule and insult" described by this Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57,

66 (1986) -- , although it falls short of causing serious psychological injury, nevertheless seriously interferes with women lawyers' self respect and ability to practice their profession in peace. These studies demonstrate the error of the court below in limiting Title VII's ban against "hostile environment" sexual harassment to conduct that causes serious psychological injury.

The restrictive interpretation of the court below finds no support in this Court's decision in *Meritor Savings Bank* or in the EEOC Guidelines on sexual harassment, 29 C.F.R. §1604.11(a). It stigmatizes women who seek a remedy under Title VII even if they win by marking them as psychologically impaired. It confuses common-law tort damage remedies with statutory employment discrimination protections. It should be enough, for a plaintiff to prevail in a "hostile environment" sexual harassment case, to prove that the complained of sexual conduct, as defined in the EEOC Guidelines, was sufficiently severe or pervasive to alter the

conditions of her employment or to create an abusive working environment, and that the conduct was unwelcome.

ARGUMENT

SEXUALLY ABUSIVE AND DEMEANING WORK-PLACE CONDUCT IS A MAJOR BARRIER TO EQUAL EMPLOYMENT OPPORTUNITY AND THEREFORE ACTIONABLE UNDER TITLE VII EVEN WHEN IT DOES NOT SUCCEED IN CAUSING SERIOUS PSYCHOLOGICAL INJURY COMPENSABLE UNDER COMMON LAW TORT REMEDIES

The requirement imposed by the court below to show serious psychological injury to the victim as an essential element of "hostile environment" sexual harassment finds no support in the Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 66 (1986) or the EEOC Guidelines on sexual harassment, 29 C.F.R. §1604.11(a). Further, it confuses common-law tort damage remedies with statutory employment discrimination protections. Finally, it stigmatizes the victim rather than the harasser by focusing on her susceptibility to psychological injury rather than his unacceptable workplace behavior.

The focus in hostile environment cases ought to be on preventing arbitrary interference with a victim's ability to do her job, not on her ability to withstand psychological punishment. As the Ninth Circuit has observed, "[a]lthough an isolated epithet by itself fails to support a cause of action for a hostile environment, Title VII's protection of employees from sex discrimination comes into play long before the point where victims of sexual harassment require psychiatric assistance." *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991).

It might be expected that women in the professional legal workplace are unlikely to face the treatment meted out to the petitioner in this case. Unfortunately, that is not so. *Amici curiae* have been active participants, over the last decade, in numerous studies documenting the pervasive problems to women lawyers of sexually abusive and demeaning treatment in the courts and other legal workplaces. These studies demonstrate that the sexually harassing conduct suf-

fered by the petitioner here -- the "discriminatory intimidation, ridicule and insult" described by this Court in *Meritor Savings Bank*, 477 U.S. at 66 -- seriously interferes with the work performance of women lawyers even when it does not succeed in seriously affecting their psychological well being. See *Ellison v. Brady*, 924 F.2d at 878 n.8.

Women lawyers continue to face a "glass ceiling" in the legal profession, as evidenced by their small numbers in its upper echelons of law firm partners and federal judges.¹ Sexual harassment persists as a major barrier to equal em-

¹ Women are 43% of all law students. They are 25% of the 350,000 member American Bar Association (ABA), the largest professional association of lawyers and judges in the United States. Nevertheless, only 18% of women in private practice are partners in law firms compared with 45% of men. Only 12% of federal judges are women. Telephone interview with ABA Membership & Marketing Division, Chicago, Illinois (March 31, 1993); *The State of the Legal Profession, 1990*, ABA Young Lawyers' Division 63 (1990); the National Association of Women Judges, letter to the membership, 9/29/92.

ployment opportunity for women lawyers.² The great majority of all women lawyers have experienced or observed sexually abusive and demeaning conduct in the legal workplace, including unwanted sexual teasing, jokes, remarks or questions, pressure for dates, sexual looks or gestures, deliberate touching, leaning over, or cornering, and other offensive conduct.³ In 1992, the American Bar Association,

² 1988 *Status Report on Women in the Legal Profession* at 8, ABA Commission on Women in the Profession Report to the ABA House of Delegates (1988) (hereafter "1988 ABA Commission on Women Status Report.") A major goal of the ABA is to promote the full and equal participation of women in the legal profession. ABA Goal IX, *Mission and Goals of the American Bar Association*, ABA Members' Guide, (4th Ed. 1992). In 1987, the ABA created the Commission on Women in the Profession to advance this goal. The Commission is composed of lawyers and judges from around the country and has conducted extensive public hearings and other investigations to assess the status of women in the profession. Its first chair was Hillary Rodham Clinton, a highly regarded lawyer and now First Lady.

³ *The State of the Legal Profession*, 1990 at 67-8. In 1984, because of apparent widespread career dissatisfaction among lawyers, the ABA Young Lawyers' Division undertook an in-depth national survey of the legal profession "in order to accurately study the state of the profession and determine the

the nation's largest professional association of judges and lawyers, approved a resolution recognizing that sexual harassment is a serious problem in all workplace settings, including the legal profession, and committing the ABA to educate the profession to provide leadership in its eradication.⁴

extent of career dissatisfaction, who is dissatisfied, and why they are dissatisfied." *Id.* at 1. The study consisted of a random probability sample of 3000 lawyers of all ages drawn from both ABA member and non-member lists totalling 569,706 lawyers, roughly 90% of the estimated universe of lawyers at the time. In 1990, the Young Lawyer's Division conducted a study to update the results and obtain statistically accurate data on emerging issues such as the persistence of gender bias as a cause of dissatisfaction among women lawyers. *Id.* at 2. See also E. Couric, *Women in the Large Firms: A High Price of Admission?*, National Law Journal, Monday, December 11, 1989 at S2. In a survey of 3000 women in the nation's largest law firms conducted by the National Law Journal/West Publishing Company, 60% of the women responding said they had experienced unwanted sexual attention.

⁴ *Report to the ABA House of Delegates on Sexual Harassment*, ABA Commission on Women in the Profession (1992); Resolution approved by ABA House of Delegates February 3, 1992.

The constituent members of NCWBA, including DC-WBA, have participated actively during the last decade in gender bias task forces established by State Chief Justices, Bar Associations, and Judicial Conferences all over the country. These task forces have used a wide variety of methods to collect information on the nature and extent of gender discrimination in the legal workplace, including holding public hearings, receiving sworn testimony and affidavits, reviewing public documents, and conducting written surveys of lawyers and judges.⁵ As of September,

⁵ For example, to obtain information about the demographic characteristics, experiences, and attitudes of the Ninth Circuit Federal Bar, the Ninth Circuit gender bias task force relied on a survey sent to a probability sample of active federal court practitioners in every district of the Ninth Circuit, including attorneys in private civil and criminal defense practice, corporate counsel, government staff attorneys, deputy federal public defenders, and assistant U.S. attorneys. A total of 3531 attorneys, about 50% of those sampled, responded to the survey. The 95% confidence interval for the sample is +/- 2%. This research is one of the largest scientifically designed surveys of attorneys ever conducted nationwide. *Preliminary Report of the Ninth Circuit Gender Bias Task Force*, United States Courts, Ninth Judicial Circuit 4-5 (1992).

1992, such task forces were at some stage of formation, report preparation, or implementation, in thirty-eight states, three federal circuits, Puerto Rico and the District of Columbia. Reports had been issued for twenty-four state court systems, the local court system in the District of Columbia, and the United States Court of Appeals for the Ninth Circuit.⁶

The survey results reported show that sexually offensive conduct toward women attorneys, particularly the younger ones, is pervasive. Women lawyers are often addressed by terms of endearment such as "honey" and "sweetheart" rather than professional titles. Male judges and opposing at-

⁶ L. H. Schafran, *Annual Report on the Activities of the National Judicial Education Program to Promote Equality for Women and Men in the Courts (NJEP)*, October 1991 through September 1992 (1992). The lists of task forces according to their conveners and their current phase of activity are set forth in the attached Appendix to the Brief. These reports are too voluminous to attach. *Amici curiae* will be glad to furnish copies of any requested.

torneys routinely make comments about women's gender,⁷

⁷ A woman attorney testified at a public hearing of the Louisiana task force on women in the courts that, at a pre-trial conference, she was the only woman among six lawyers and the judge. When her turn came to explain her version of the case, she was halfway through her theory when the judge interrupted and said: "Oh, come on now; shut up. Let's hear what the men have to say." *Final Report, Louisiana Task Force on Women in the Courts* 116 (1992).

physical appearance and clothing⁸, sexual attractiveness⁹ and sexual availability.¹⁰

Such conduct interferes with women attorneys' ability to make a living, because it undermines them before those

⁸ In a case where a female attorney was representing proposed adoptive parents, the judge looked her up and down and said: "they don't make the stork like they used to!" Another male judge said to a pregnant attorney, "So I see you got knocked up." *Gender Bias in the Courts* 122, Maryland Special Joint Committee (1989) (hereafter "*Maryland Report*"). A male court referee said to a woman attorney who had just given birth to a child, in front of clients and opposing counsel, "My, your breasts have gotten big from nursing, haven't they!" *Final Report, Minnesota Supreme Court Task Force for Gender Fairness in the Courts* 92 (1989) (hereafter "*Minnesota Report*").

⁹ The Minnesota study reports that a male judge interrupted a female prosecutor's opening statement to call her to the bench to tell her he liked the way she was wearing her hair that day. *Minnesota Report* at 91.

¹⁰ During a chambers conference with one male and three female attorneys, the male judge asked: "How's the rooster making out with all these hens?" *Maryland Report* at 122.

they most need to impress -- judges, juries, supervisory attorneys and clients.¹¹

Women attorneys who object to such conduct are considered to be radical feminists or women's libbers,¹² while those who do not object because, for example, they

¹¹ Of the judges who responded to the judges' surveys conducted by the Massachusetts Gender Bias Study Committee's survey, one-third reported having observed instances in which gender affected the relationship between opposing counsel, including belittling remarks made to female attorneys, improper address by first name or terms of endearment, and not allowing female attorneys to speak. Sixty percent of those judges believed that such conduct was detrimental to the presentation of the case at hand, because it drew attention away from the issues, placed counsel in unequal standing, interfered with female counsel's presentation, delayed the trial, or demeaned the professional atmosphere of the court. *Gender Bias Study of the Court System in Massachusetts* 145-146, 151, Supreme Judicial Court of Massachusetts (1989).

¹² 1988 ABA Commission on Women Status Report at 10. A female associate of an Indiana law firm described unwanted forced fondling by a senior associate and other incidents involving a partner. When she reported them to two of the highest ranking partners in the firm (all male), she was told that she was a problem to the firm because she could not get along with people and that no matter what anyone did to her she was to keep her mouth shut. *Report of the Commission on Women in the Profession* at 31, Indiana State Bar Association (1991).

fear prejudice to their clients' case,¹³ are seen as weak and vulnerable. There should be no doubt that, when sufficiently pervasive, such conduct seriously interferes with women attorneys' self-respect, authority, credibility and reputation in the community, and consequently, with their freedom to perform to their highest potential.¹⁴

¹³ Responses to the survey conducted by the Maryland State Bar Association included the comment that a woman attorney had been treated like a child and called "little girl" in front of her clients by certain judges, that she resented this treatment, but was unable to object because she was "in a position where I can't do anything without adversely affecting my client's case." *Maryland Report* at 119. In the Minnesota survey, concerns about possible negative consequences for the attorney or her client were particularly influential in the decision not to object to unwanted sexual commentary. *Minnesota Report* at 95.

¹⁴ In *Broderick v. Ruder*, 685 F. Supp. 1269 (D.D.C. 1988), the United States District Court for the District of Columbia held the U.S. Securities and Exchange Commission liable under Title VII for hostile environment sexual harassment against a female SEC attorney. The court found that the environment, in which, *inter alia*, senior male SEC attorneys made sexually crude remarks to the plaintiff and others, touched them without their consent, and bestowed preferential treatment on those who submitted to their sexual advances, poisoned any possibility of the plaintiff "having the proper professional re-

The requirement of serious psychological damage imposed by the court below confuses common-law tort damage remedies with statutory employment discrimination protections against arbitrary barriers to equal employment opportunity. Obviously, not all sexual harassment causes serious psychological injury. In cases where severe psychological injury does result, plaintiffs already commonly join pendent claims for state tort causes of action, including intentional infliction of emotional distress, to their Title VII claims. See B. Schlei & P. Grossman, *Employment Discrimination* 428-429 (2d Ed. 1983). An essential element of proof in these claims is the infliction of severe psychological injury. *Restatement (Second) of Torts* §46 (1965), *Rogers v. Loews L'Enfant Plaza Hotel*, 526 F. Supp. 523, 529-531 (D.D.C.

spect for her superiors and, without any question, affected her motivation and her performance of her job responsibilities." *Id.* at 1273. It rejected defense attempts to redirect the case to plaintiff's state of mind by characterizing her as "paranoid," focusing rather on her sexually demeaning conditions of employment.

1981). Thus, the interpretation of Title VII's ban on sexual harassment imposed by the court below simply duplicates existing common law tort remedies. Worse, it fails to protect employees from sexually abusive and demeaning workplace conduct which falls short of causing severe psychological injury, no matter how much such conduct interferes with work performance.

The requirement to prove serious psychological injury from sexual harassment will deprive women of the protection of Title VII by deterring complaints in all except the most egregious situations. Women lawyers are already afraid to complain because, if they do, they are considered unfit to be lawyers because "they can't take it." Under this standard, they will be deprived of a legal remedy for job interference until sexual harassment becomes so severe and psychologically damaging that they may in fact be unfit to perform as lawyers. Then, even if they win their Title VII cases, they will be stigmatized by being identified as psychologically

impaired. As a result, women will never realize their full potential as equal members of the legal profession because they will have to accept, as the price of their profession, sexually demeaning treatment such as the "dumb ass woman" description condoned by the courts below.

It should be enough, for a plaintiff to prevail in a "hostile environment" sexual harassment case, to prove that the complained of sexual conduct, as defined in the EEOC Guidelines, was sufficiently severe or pervasive to alter the conditions of her employment or to create an abusive working environment, and that the conduct was unwelcome.

Meritor Savings Bank, 477 U.S. at 67-68; *Burns v. McGregor Electronic Industries, Inc.*, 955 F.2d 559, 563-564 (9th Cir. 1992); *Ellison v. Brady*, 924 F.2d at 876; *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3rd Cir. 1990).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

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APPENDIX

GENDER BIAS TASK FORCES IN THE COURTS ACCORDING TO STAGE OF ACTIVITY AND BY WHOM AND WHEN ESTABLISHED.

Source: L.H. Schafran, *Annual Report on the Activities of the National Judicial Education Program to Promote Equality for Women and Men in the Courts (NJEP)*, October 1991 through September 1992, Appendix, Task Forces on Gender Bias in the Courts as of September 1992 (1992).

1. Task Force Reports Issued and by whom and when task force established

Preliminary Report of the Ninth Circuit Gender Bias Task Force, United States Courts, Ninth Judicial Circuit (1992) (Ninth Circuit Judicial Conference 1990);
Achieving Equal Justice for Women and Men in the Courts, Draft Report of the California Judicial Council Advisory Committee on Gender Bias in the Courts (1990) (the Chief Justice, 1987);
Gender & Justice in the Colorado Courts, Colorado Supreme Court Task Force on Gender Bias in the Courts (1990) (the Chief Justice, 1988);
Gender, Justice and the Courts, Report of the Connecticut Task Force (1991) (the Chief Justice, 1987);
Final Report of the District of Columbia Task Force on Racial and Ethnic Bias and Task Force on Gender Bias in the Courts (1992) (District of Columbia Courts Joint Committee on Judicial Administration, 1990);
Report of the Florida Gender Supreme Court Bias Study Commission (1990) (the Chief Justice, 1987);

Gender and Justice in the Courts, a Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System (1991) (the Chief Justice, 1989);
Achieving Gender Fairness; Designing a Plan to Address Gender Bias in Hawaii's Legal System, Report of the Ad Hoc Committee on Gender Bias (1989) (the Chief Justice, 1987);
Report of the Idaho Judicial Fairness and Equality Committee of the Supreme Court (1990) (the Chief Justice, 1990);
The 1990 Report of the Illinois Task Force on Gender Bias in the Courts (1990) (three bar associations at the direction of the Supreme Court, 1988);
Report of the Commission on Women in the Profession, Indiana State Bar Association (1991);
Equal Justice for Women and Men, Kentucky Task Force on Gender Fairness and the Courts (1992) (the Chief Justice and the Kentucky Bar Association, 1989);
Final Report, Louisiana Task Force on Women in the Courts (1992) (the Chief Justice, 1989);
Gender Bias in the Courts, Maryland Special Joint Committee (1989) (the Chief Judge, 1987);
Gender Bias Study of the Court System in Massachusetts, Supreme Judicial Court (1989) (the Chief Judge, 1986);
Final Report of the Michigan Supreme Court Task Force on Gender Issues in the Courts (1989) (the Chief Justice, 1987);
Final Report, Minnesota Supreme Court Task Force for Gender Fairness in the Courts (1989) (the Chief Justice, 1987);
Justice for Women, Nevada Supreme Court Gender Bias Task Force (1989) (the Chief Justice, 1986);
First Year Report (1984), *Second Year Report* (1986), the New Jersey Supreme Court Task Force on Women in the Courts (the Chief Justice, 1982);
Final Report of the New Mexico State Bar Task Force on Women and the Legal Profession (Mexico, 1990) (New Mexico Bar Association, 1989);

Report of the New York Task Force on Women in the Courts (1986) (the Chief Judge, 1984);
Final Report of the Rhode Island Committee on Women in the Courts (1987) (the Chief Justice, 1984);
Report to the Utah Judicial Council, Utah Task Force on Gender and Justice (1990) (the Chief Justice, 1986);
Gender and Justice, Report of the Vermont Task Force on Gender Bias in the Legal System (1991) (the Chief Justice and the Vermont Bar Association, 1988);
Final Report of the Washington State Task Force on Gender and Justice in the Courts (1989) (the Chief Justice, 1987);
Final Report, Wisconsin Equal Justice Task Force (1991), (the Chief Justice, 1989).

2. Task Force Reports in preparation and by whom and when task force established

Pima County, Arizona, Task Force for the Study of Gender and Justice (established in 1983 by a Judge, endorsed by the Supreme Court, now sponsored by a Bar Association);
Arkansas Bar Association Commission on Women and Minorities (Arkansas Bar Association, 1989);
Association of the Bar of the City of New York Subcommittee Regarding Gender Bias in the Federal Courts (Southern and Eastern Districts of New York) (City Bar, 1991);
District of Columbia Circuit Court of Appeals Task Force on Racial, Ethnic and Gender Bias (Judicial Council of D.C. Circuit, 1990);
Iowa Equality in the Courts Task Force (the Chief Justice, 1990);
Kansas Task Force on the Status of Women in the Profession and in the Courts (Kansas Bar Association, 1989);
Missouri Gender and Justice Task Force (the Chief Justice, 1990);
Montana Gender Bias Task Force (the Chief Justice, 1990);

Nebraska Task Force on Gender Fairness (the Chief Justice, 1991);

Ohio Task Force on Gender Bias in the Courts (Supreme Court and Ohio Bar Association, 1991);

Puerto Rico Judicial Commission to Study Gender Bias in the Courts (the Chief Justice, 1992);

Texas Task Force on Gender Bias in the Courts (Supreme Court, 1991).

3. Task Forces in process, and by whom and when established

Alaska Ad Hoc Working Group on Gender Bias, 1992;

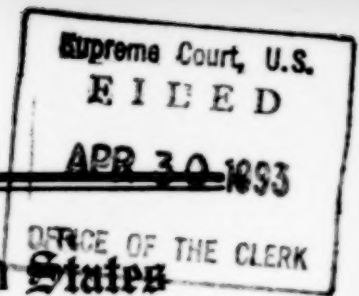
Delaware Committee to Explore Gender Bias Study (the Chief Justice, 1992);

Maine Exploratory Committee on Gender Bias (the Chief Justice, 1989);

North Dakota Judicial System Gender Fairness Assessment Sub-Committee of the North Dakota Judicial Planning Committee (Supreme Court, 1987);

Pennsylvania Task Force on Gender and Justice (Pennsylvania and Philadelphia Bar Associations, 1991).

No. 92-1168



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Supreme Court of the United States

OCTOBER TERM, 1992

TERESA HARRIS,

Petitioner,

v.

FORKLIFT SYSTEMS, INC.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF THE WOMEN'S LEGAL DEFENSE FUND,
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IN THE
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**On Writ of Certiorari to the
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**BRIEF OF THE WOMEN'S LEGAL DEFENSE FUND,
THE NATIONAL WOMEN'S LAW CENTER, *ET AL.*,
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

INTEREST OF THE *AMICI CURIAE*¹

Amici are public interest advocacy organizations and labor unions dedicated to, *inter alia*, advancing the employment rights of women. They litigate and educate the public to improve equal opportunity for women and other historically disadvantaged groups in employment, education, and other areas of public interest.²

The case before the Court is of great interest to *amici* because hostile environment harassment remains a potent

¹ Pursuant to Rule 37.3 of the Rules of this Court, letters indicating the written consent of all parties to the filing of this brief are being lodged with the Court.

² Individual statements of interest of the *amici* are attached as Appendix A to this brief.

barrier to women's equal access to the workplace. The decisions below, if allowed to stand, would raise that barrier to new and largely unscalable heights.

SUMMARY OF ARGUMENT

The courts below held that a victim of hostile environment harassment has a claim under Title VII only if the harassment caused serious psychological injury to the plaintiff and would have caused serious psychological injury to a reasonable woman in her position.³ That holding has no foundation in Title VII, in this Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), or in the guidelines on sexual harassment issued by the Equal Employment Opportunity Commission ("EEOC"). Nor does a psychological injury requirement find any legitimate basis in the lower court decisions on which it purportedly is based. Moreover, such a requirement would seriously undermine the purposes of Title VII by forcing members of protected groups to endure a hostile work environment without legal recourse. It would also punish those who seek to vindicate their rights by creating incentives to shift the inquiry from the defendant's conduct to the victim's personal history and by foreclosing a legal remedy to the many victims who initially endure hostile conduct in silence.

Because the psychological injury requirement is the only question presented to the Court, any ruling should be limited to that issue. If the Court should choose to write more broadly on the issue of hostile environment harassment, however, it should correct two additional legal errors apparent on the face of the magistrate's opinion below.

First, the magistrate adopted the Sixth Circuit's misstatement of the legal standard used to determine whether hostile conduct is sufficiently severe or pervasive to con-

³ *Amici* use petitioner's "psychological injury" characterization of the lower courts' test throughout this brief. See *infra* n.5.

stitute a Title VII violation. Rather than requiring proof either that her working environment was intimidating, hostile or offensive *or* that the conduct "unreasonably interfer[ed] with [her] work performance," the courts below required petitioner to prove both. Second, the magistrate adopted the requirement imposed by some lower courts that a hostile environment victim prove that the conduct at issue would have altered the conditions of some "reasonable person's" or "reasonable woman's" employment. Such requirements have the effect of perpetuating invidious discrimination and should be rejected.

ARGUMENT

I. TITLE VII DOES NOT REQUIRE PLAINTIFFS TO PROVE PSYCHOLOGICAL INJURY IN ORDER TO ESTABLISH LIABILITY IN A HOSTILE ENVIRONMENT CASE.

Title VII of the Civil Rights Act of 1964 forbids discrimination with respect to the "terms, conditions, or privileges of employment" on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (a)(1) (1988). In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986), this Court made clear that Title VII's protections are not limited to disparate wages or other "'economic' or 'tangible'" benefits of employment. Rather, through Title VII, Congress struck at "the entire spectrum of disparate treatment of men and women" in employment. *Id.* (quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). The Court held that Title VII liability may be established by proof that "discrimination based on sex has created a hostile or abusive work environment." *Id.* at 66.⁴

⁴ The term "sexual harassment" encompasses two broad classes of claims, "quid pro quo" and "hostile environment" claims. Quid pro quo claims require no showing of severity or pervasiveness of the conduct, for they involve conduct that, by definition, affects the terms and conditions of employment. See 29 C.F.R. § 1604.11 (a)(1) & (2). Those claims do, however, include an "unwelcome-

The holding of the courts below would render the *Meritor* holding and Title VII's protections largely illusory. The courts held here that, even though petitioner found her employer's conduct offensive, and even though a reasonable woman in her position would have found it offensive, petitioner could not establish Title VII liability unless she could show that she had suffered, and a reasonable woman would have suffered, psychological injury.⁵ That holding is plainly wrong.

ness" element. Hostile environment claims, on the other hand, require proof that the conduct was "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor*, 477 U.S. at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). The Court in *Meritor* indicated that courts evaluating hostile environment sexual harassment claims should also inquire whether the alleged conduct is "unwelcome." *Id.* at 68.

The "unwelcomeness" element presumably was developed in recognition that consensual romantic relationships can occur in the workplace. Many hostile environment claims, however, involve derogatory, status-based comments that could not possibly be considered consensual. Comments such as "You're a dumb ass woman," or "You're a woman, what do you know," see Pet. App. at A-9, could never be considered "welcome" by the target. Similarly, "vulgar and offensive sexually related epithets addressed to [or] employed about" any person are *per se* unwelcome. *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983). Because there is no question of consent to discriminatory, status-based epithets, the unwelcomeness requirement is superfluous in those cases. See also the Brief *Amici Curiae* filed by the NAACP Legal Defense and Education Fund, *et al.*, in support of petitioner in this case.

⁵ The magistrate referred to whether conduct "affected seriously the psychological well-being" of the plaintiff. Pet. App. at A-16-A-17 (quoting *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 619-20 (6th Cir. 1986)). Petitioner has characterized this test as requiring proof of "severe psychological injury." Pet. at i, 10. The EEOC also characterizes the *Rabidue* "psychological well-being" test as requiring proof of "psychological injury." U.S. EEOC *Policy Guidance on Current Issues of Sexual Harassment* (Mar. 19, 1990), reprinted in EEOC Compl. Man. (CCH) ¶ 3114, at 3274 n.20.

The "psychological injury" requirement invoked by the courts below was first articulated by the Sixth Circuit in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). In one of the first appellate decisions addressing sexual harassment after this Court's decision in *Meritor*, the *Rabidue* court set out five elements for proof of a sexual harassment hostile environment claim under Title VII. Among those elements was the requirement that the plaintiff prove that

the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment *that affected seriously the psychological [sic] well-being of the plaintiff.*

Id. at 619 (emphasis added). The court stated that the plaintiff must show both that the conduct in question would "affect seriously the psychological well-being of [a] reasonable person under like circumstances," and that she herself was actually offended by the conduct and suffered injury as a result of the hostile work environment. *Id.* at 620. In support of its analysis, the court cited "the EEOC guidelines and . . . existing legal precedent." *Id.* at 619.

As we show below, the "psychological injury" requirement articulated in *Rabidue* has no foundation in Title VII, in this Court's decision in *Meritor*, or in the EEOC guidelines. Nor does other "existing legal precedent" support the requirement. Moreover, any "psychological injury" requirement should be rejected because it would seriously undermine the remedial purposes underlying Title VII. While proof of psychological injury may be relevant to determination of the appropriate remedy, there is no reason to consider the issue at the liability stage of a Title VII hostile environment suit.⁶

⁶ The one question on which evidence of psychological injury to the plaintiff is relevant is the issue of appropriate remedy. Under

A. The "Psychological Injury" Requirement Has No Foundation in Title VII, *Meritor*, Or The EEOC Guidelines.

Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2 (a)(1) (1988), provides that

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Nothing on the face of this provision suggests that a Title VII plaintiff must make any particular showing of injury. Although a plaintiff who complains of hostile environment harassment based on race, sex, or other protected status must show that the conduct at issue discriminated against her with respect to the terms and conditions of her employment, there is no indication that such discrimination must have resulted in "psychological injury," much less "severe psychological injury," before the employer can be held liable.

Nor does this Court's holding in *Meritor* require a plaintiff to demonstrate psychological injury to establish Title VII liability. The Court did suggest that exposure to an isolated status-based epithet that "engenders offensive feelings in an employee" would not affect the conditions of employment to [a] sufficiently significant de-

the 1991 Civil Rights Act, Title VII plaintiffs who establish liability may seek compensatory damages. 42 U.S.C. § 1981a(a)(1). It is important, however, not to confuse issues of liability and damages, as any liability standard that focuses on the nature or severity of a plaintiff's injuries necessarily does. A plaintiff who is not able to recover significant damages should at least be able to obtain nominal damages and, more importantly, injunctive relief against the employer's discriminatory conduct. See *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990); Susan Estrich, *Sex at Work*, 43 Stan. L. Rev. 813, 858 (1991).

gree to violate Title VII." 477 U.S. at 67 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)). It concluded that, to be actionable, hostile environment harassment "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). This standard focuses on the severity or pervasiveness of the conduct at issue and the effect of the conduct on the plaintiff's work environment. It does not call for any inquiry into the nature or degree of injury to the plaintiff.⁷

Meritor endorsed the approach taken by the EEOC in its 1980 guidelines on sexual harassment. Under the guidelines, harassment exists where the conduct has the "purpose or effect" of creating an "intimidating, hostile, or offensive working environment" or of "unreasonably interfering with an individual's work performance." 29 C.F.R. § 1604.11(a). The guidelines do not even suggest that Title VII liability exists only where harassment "affect[s] seriously the psychological well-being of the plaintiff." *Rabidue*, 805 F.2d at 619. More recently, the EEOC explicitly rejected the Sixth Circuit's conclusion that a Title VII plaintiff who alleges sexual harassment must demonstrate the existence of psychological injury. U.S. Equal Employment Opportunity Comm'n, *Policy Guidance on Current Issues of Sexual Harassment* (Mar. 19, 1990), reprinted in EEOC Compl. Man. (CCH) ¶ 3114, at 3274 n.20.

⁷ The Court in *Meritor* also indicated that courts should inquire whether the alleged conduct is "unwelcome." 477 U.S. at 68. Presumably this inquiry requires a court to consider whether a Title VII plaintiff had some negative reaction—whether communicated or not—to the alleged conduct. There is no suggestion, however, that the plaintiff must show that she has suffered psychological injury in order to satisfy the "unwelcomeness" requirement.

B. The "Psychological Injury" Requirement Is Not Supported By "Other Existing Precedent".

In adopting a "psychological injury" requirement, the Sixth Circuit purported to rely on several lower court precedents. Those cases, however, do not provide any legitimate basis for such a requirement.

Among the cases cited by the *Rabidue* majority, the only one that appears to state a "psychological injury" requirement is *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).⁸ The court in *Henson* cited *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), for the proposition that the employee's state of psychological well-being is a term, condition, or privilege of employment protected by Title VII. It then held that the conditions of a hostile work environment victim's employment are not altered unless the harassment

is sufficiently severe and persistent to affect seriously the psychological wellbeing of employees 29 C.F.R. § 1604.11(b) (1981); *see Calcote v. Texas Educational Foundation, Inc.*, 458 F. Supp. [231,] 237 (W.D. Tex. 1976)[, *aff'd*, 578 F.2d 95 (5th Cir. 1978)]; *Compston v. Borden, Inc.*, 424 F. Supp. 157, 158-61 (S.D. Ohio 1976).

682 F.2d at 904.⁹

But the *Rogers* case, referred to in *Henson*, does not support any "psychological injury" requirement. The court in *Rogers* held that the terms and conditions of employment could be altered by a discriminatory environment, even where wages, hours, or economic fringe benefits were not affected. In describing the broad terms and purpose of Title VII, the court noted that "employees' psychological as well as economic fringe[bene-

⁸ *Rabidue* also cited *Downes v. FAA*, 775 F.2d 288, 292-93 (Fed. Cir. 1985), but *Downes* merely relied on *Henson*.

⁹ Although *Meritor* quoted *Henson* with approval, it did not cite or quote the "affect seriously the psychological well-being" language.

fits] are statutorily entitled to protection from employer abuse." 454 F.2d at 238. The court then posited a worst-case scenario—a working environment "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers"—and concluded, quite properly, that "Title VII was aimed at the eradication of such noxious practices." *Id.* The court proceeded to find a Title VII violation on facts that fell far short of the "worst case"—"a subtle scheme designed to create a working environment imbued with discrimination" against Hispanic employees. *Id.* at 239. The plaintiff in *Rogers* was not required to make any showing of "psychological injury."¹⁰

Nor does the other authority cited in *Henson* support a "psychological injury" requirement. The cited section of the EEOC guidelines merely states that the Commission will look at the "totality of the circumstances" in determining whether conduct constitutes sexual harassment. 29 C.F.R. § 1604.11(b) (1981). Included in those circumstances are the nature and context of the conduct in question, but not the plaintiff's reaction to it. *Id.*

The two district court decisions cited in *Henson* are also entirely silent on the need for any showing of psychological injury. *Calcote v. Texas Educational Foundation, Inc.*, 458 F. Supp. 231 (W.D. Tex. 1976), involved a white employee who alleged that he was constructively discharged because he suffered racial harassment by his black supervisor. The court in *Calcote* cited *Rogers*, but only for the proposition that Title VII protects employees from "a working environment heavily charged with ethnic

¹⁰ Other courts subsequently adopted the thoughtful analysis of the *Rogers* court without requiring proof of psychological injury to the plaintiff. *See, e.g., Firefighters Institute For Racial Equality v. St. Louis*, 549 F.2d 506, 514 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977).

or racial discrimination.” *Id.* at 237. The court did not mention the “psychological well-being” of the plaintiff.

Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976), involved discrimination on the basis of religion, including the repeated use of anti-semitic epithets. Although the court noted that it would have awarded compensatory damages were they available because “Compston suffered mental anguish and humiliation at defendants’ hands,” *id.* at 162, it neither stated nor imposed a psychological injury requirement as a threshold for finding liability. It held only that a manager’s demeaning of an employee based on his religious views would necessarily have the effect of altering conditions of employment. *Id.* at 160-61.

The Eleventh Circuit itself appears to have largely disavowed any “psychological injury” requirement less than a month after *Henson* issued. In *Walker v. Ford Motor Co.*, 684 F.2d 1355 (11th Cir. 1982), authored by a member of the *Henson* panel, the court quoted *Henson*’s reference to the psychological well-being of an employee. *Id.* at 1358. But the sole reference to the psychological well-being of the plaintiff in *Walker* was a passing comment that the conduct—use of racial epithets by co-workers—made the plaintiff “feel unwanted and uncomfortable in his surroundings.” *Id.* at 1359. The court focused primarily on the conduct at issue, not on its effect on the plaintiff.¹¹

¹¹ A number of courts appear to have disregarded *Walker* and have cited *Henson* in support of a “severe psychological injury” requirement, apparently without independently evaluating the basis for such a requirement. See, e.g., *Downes*, 775 F.2d at 295 (characterizing *Henson* as requiring proof of “severe psychological damage”). Although *Walker* involved racial, rather than sexual, harassment, the standards for each, resting as they do on identical language in Title VII, are the same. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 n.9 (1989).

C. A “Psychological Injury” Requirement Would Undermine The Purposes of Title VII.

This Court has held that Congress intended, through Title VII, “to strike at the entire spectrum of disparate treatment” of protected classes in employment. *Meritor*, 477 U.S. at 64 (quoting *Manhart*, 435 U.S. at 707 n.13). This purpose would be significantly undermined if a “psychological injury” requirement were imposed on Title VII plaintiffs in hostile environment cases.

1. *The Basic Right to a Nondiscriminatory Workplace Would Be Undermined by the Imposition of a “Psychological Injury” Requirement.*

Title VII confers on individuals the right to “work in an environment free from discriminatory intimidation, ridicule, and insult,” even in the absence of economic injury. *Meritor*, 477 U.S. at 65. The right to such an environment would be seriously undermined if it could be enforced only when an individual could prove that she had suffered psychological injury or that a reasonable person would have suffered such an injury. A workplace may be hostile to members of a protected group even when they cannot demonstrate that they experienced economic or psychological injury as a result. For example, an employer’s conduct may tell an employee that members of his or her group are not welcome as equal participants in the work environment. See, e.g., *Walker v. Ford Motor Co.*, 684 F.2d at 1357 (dealership condoned frequent use of the term “nigger”); *Compston v. Borden, Inc.*, 424 F. Supp. at 158 (supervisor repeatedly made anti-semitic remarks to Jewish employee). Segregation or exclusion of certain groups can also create a hostile environment for minority employees. See, e.g., *Firefighters Inst. for Racial Equality v. St. Louis*, 549 F.2d at 514 (exclusion of black firefighters from eating clubs); *Rogers v. EEOC*, 454 F.2d at 236 (segregation of Hispanic customers). In each of these cases, the conduct at

issue rendered the work environment hostile to members of the targeted group, regardless of the effect on the psyche of the individual employee.

In addition, conduct that "sexualizes women workers," such as sexual slurs, innuendos, jokes, propositions, and demeaning pictorial displays, treats them as sexual objects, rendering them not welcome as "credible colleague[s] and . . . equal[s]." Kathryn Abrams, *Gender Discrimination & the Transformation of Workplace Norms*, 42 Vand. L. Rev. 1183, 1208-09 (1989); *Bundy v. Jackson*, 641 F.2d 934, 945 (D.C. Cir. 1981) ("demeaning sexual stereotypes [in] the general work environment . . . always represent[] an intentional assault on an individual's innermost privacy"). Sexual slurs are "not only improper but . . . intensely degrading, deriving their power to wound not only from their meaning but also from 'the disgust and violence they express[] phonetically.'" *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983) (quoting C. Miller & K. Swift, *Words & Women* 109 (1977)). Again, such conduct clearly can affect workplace conditions, rendering the work environment hostile, intimidating or offensive to women, regardless of whether individuals can demonstrate psychological injury to the satisfaction of the trier of fact.

On its face, conduct such as that described above constitutes blatant discrimination that can create a hostile workplace environment for groups protected under Title VII. It seems obvious that such conduct would make employees who are members of those groups feel "unwanted and uncomfortable" in the work setting, even if the conduct would not necessarily cause psychological injury to particular individuals. *Walker*, 684 F.2d at 1359.

Sexual slurs and other status-based conduct are not simply offensive to their target; they can and often do interfere with the target's work performance. See *Ellison v. Brady*, 924 F.2d 872, 878 n.8 (9th Cir. 1991); Peggy Crull, *Stress Effects of Sexual Harassment on the*

Job: Implications for Counseling, 52 Amer. J. Orthopsychiat. 539, 541 (1982) (seventy-five percent of subjects reported that sexual harassment had adversely affected their job performance.) Respondents to a 1981 sexual harassment survey conducted by the federal government reported that harassment had adversely affected their feelings about work, their ability to work with others on the job, their attendance, and the quantity and quality of their work. See U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace: Is it a Problem?* 81 (1981) (hereinafter "USMSPB"). Moreover, harassment can and does affect how other employees see the victim. The magistrate here found that petitioner believed that her employer's harassment "had undermined her authority" as a manager. Pet. App. at A-14.

It would defeat the purpose of Title VII if an employer could maintain a discriminatory work environment by stopping short of actions that would result in psychological injury—or worse, *severe* psychological injury. Surely the statute does not require that employees tolerate discrimination so long as it does not drive them to the brink of mental illness or suicide. See *Ellison*, 924 F.2d at 878 (Title VII does not require that a plaintiff suffer anxiety or debilitation in order to establish liability). Otherwise, the psychologically resilient could never challenge a hostile work environment, and employers could harass such an employee with impunity.

For Title VII to work well, employers must act to prevent hostile conduct from occurring. See 29 C.F.R. § 1604.11(f). Because it would be difficult to gauge what conduct would trigger psychological injury, even an employer who sought to maintain a work environment free of invidious discrimination would be hampered in that effort.¹² Employers not motivated to maintain a non-

¹² Employers should not, presumably, be expected to send any employee who complains about harassment for psychiatric evaluation.

discriminatory work environment would be far less inclined to take proactive measures if they faced liability only where their conduct could inflict psychological injury on their employees.

This case exemplifies the manner in which a psychological injury requirement can defeat the purpose of Title VII. The employer here repeatedly stated that he "needed a man as rental manager." Pet. App. A-9. The magistrate found that the employer had repeatedly subjected petitioner to sex-based epithets and taunts. *Id.* at A-8-A-9. For example, the employer asked women (but not men) to take coins out of his front pocket. *Id.* at A-9. He asked women (but not men) to retrieve objects from the floor and commented on how they could dress to expose their breasts. *Id.* The magistrate concluded that the petitioner "was the object of a continuing pattern of sex-based derogatory conduct" by the employer, *id.* at A-8, that the employer demeaned female employees, *see id.* at A-14, A-19, and that the employer's conduct offended the petitioner and would have offended a reasonable female manager, *id.* at A-19. Petitioner testified that the conduct caused her to cry frequently and to begin drinking heavily outside work and ultimately to quit her job. *Id.* at A-10.

Nevertheless, the magistrate concluded that there was no liability under Title VII because he was not persuaded that the employer's conduct had seriously affected petitioner's psychological well-being. Pet. App. at A-19. Under that ruling, the employer was free to continue what was obviously an environment hostile to women and to impose such disparate treatment as a condition of employment for all of his female employees. This result cannot be consistent with Congress's intent to eliminate all forms of workplace discrimination. *See Rogers*, 454 F.2d at 239.

2. A "Psychological Injury" Requirement Would Undermine Title VII's Purposes By Improperly Shifting The Inquiry From The Harasser's Conduct To The Victim's Personal History and Contemporaneous Reactions.

A psychological injury requirement creates several practical problems that undermine Title VII's purposes. First, the psychological injury requirement invites the same pernicious "trial of the victim" that has been decried in the context of rape cases. *See Susan Estrich, Sex at Work*, 43 Stan. L. Rev. 813, 850-51 (1991); Ann Juliano, Note, *Did She Ask For It?: The "Unwelcome" Requirement in Sexual Harassment Cases*, 77 Cornell L. Rev. 1558, 1576 (1992). To defend against claims of a hostile work environment, defendants may seek to show that, due to the victim's prior experiences, she could not have suffered psychological injury as a result of the conduct.¹³

That danger is far from hypothetical. In analyzing the element of "unwelcomeness" articulated by this Court in *Meritor*, several lower courts have cited prior conduct of the victim in concluding that otherwise offensive conduct could not have been unwelcome or offensive to that individual. *See, e.g., Burns v. McGregor Electronic Industries, Inc.*, 955 F.2d 559, 565 (8th Cir. 1992) (finding relevant to unwelcomeness the fact that the plaintiff had posed nude for a magazine outside of work), *modified after remand*, 1993 U.S. App. LEXIS 6336 (8th Cir. Mar. 30, 1993); *Kresko v. Rulli*, 432 N.W.2d 764, 770 (Minn. App. 1988) (approving inquiry into plaintiff's subsequent relationships outside of work); *cf. Kirkland v. Brinias*, 741 F. Supp. 692, 694, 698 (E.D. Tenn. 1989) (even though a reasonable person would find the

¹³ The *Rabidue* majority expressly invited such an inquiry by holding that the plaintiff's "background and experience" were relevant to the existence of a hostile environment. *Rabidue*, 805 F.2d at 620.

ods, and to promulgate information regarding human psychological behavior.

APA has participated as an *amicus* in many cases in this Court involving mental health and social science issues. APA contributes *amicus* briefs only where it has special knowledge to share with the Court. For example, APA submitted briefs in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Watson v. Ft. Worth Bank and Trust*, 487 U.S. 977 (1988); *Maryland v. Craig*, 497 U.S. 836 (1990); and *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

APA regards this as a case in which it can make a significant contribution to the Court's consideration of two issues raised by this case, which are of particular interest to APA and its members. First, appellant challenges the Sixth Circuit's requirement that the victim of an alleged hostile work environment prove, as elements of the Title VII claim, that the work situation would seriously affect a reasonable victim's psychological well-being and that it psychologically injured the plaintiff. Second, the case potentially presents the question whether a court reviewing a hostile work environment claim should consider the conduct complained of from the point of view of a "reasonable victim" or a "reasonable person."

Since the late 1970s, sexual harassment has been the subject of scientific inquiry, most of which has been undertaken by APA members. The growing body of social science data provides insight into harassing behavior, its impact on its targets and on the workplace, workplace conditions more and less conducive to sexual harassment, the differences between men's and women's perceptions of interactions between the sexes in the workplace, and other factors which would inform this Court's determination of the appropriate legal standard for hostile work environment actions grounded in sexual harassment. This data bears on whether psychological injury is an appropriate

and effective measurement of sexual harassment and the extent to which "reasonable victim" and "reasonable person" standards would be likely to yield different results.

APA believes no other *amicus*, and certainly neither party, is in a position to provide the Court with this important information.²

INTRODUCTION AND SUMMARY OF ARGUMENT

"Sexual harassment is a problem with a long past but a short history."³ The growing body of evidence amassed since the late 1970s, when psychologists began studying the problem, demonstrates that sexual harassment is a serious and pervasive barrier to women's full enjoyment of employment opportunities. At least half of all working women have been sexually harassed at the workplace during their careers.⁴ The proportion is even higher for women in jobs traditionally held by men.⁵

² Counsel gratefully acknowledges the assistance of APA staff member Gwendolyn Keita, Ph.D., and APA members Louise F. Fitzgerald, Ph.D., Karla Fischer, Ph.D., J.D., Barbara Gutek, Ph.D., John Pryor, Ph.D., and Bruce Sales, Ph.D., J.D., in the preparation of this brief.

³ Fitzgerald & Shullman, *Sexual Harassment: A Research Analysis and Agenda for the 1990s*, 42 J. of Vocational Behav. 5, 23 (1993).

⁴ See Terpstra & Baker, *A Hierarchy of Sexual Harassment*, 121 J. of Psych. 599, 599 (1987) (citing studies showing 42 to 90 percent of working women surveyed reported being sexually harassed at work; variation reflected time period covered by study and sampling strategy); B. Gutek, *Sex and the Workplace* 46 (1985) (53 percent of female Los Angeles area workers interviewed reported experiencing sexual harassment at their workplace); Martindale, *Sexual Harassment in the Military: 1988* xiii (Sept. 1990) (64 percent of Navy women surveyed reported experiencing sexual harassment).

⁵ See Fitzgerald & Shullman, *supra* note 3, at 7, 15; Gruber, *The Sexual Harassment Experiences of Women in Non-traditional Jobs, Results from Cross-National Research* 126-27 (March, 1992).

In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65-67 (1986), this Court held that Title VII provides redress for sexual harassment that creates an intimidating, hostile, or offensive working environment. The Court did not specifically undertake to resolve whether such a claim requires a showing of psychological injury. APA submits that requiring plaintiffs to prove psychological injury would undermine the goals of Title VII without providing a useful measurement by which to gauge the severity of sexual harassment, or to separate workplace conduct that adversely affects equal employment opportunity from conduct that does not.

The courts that have interposed a psychological injury requirement have done so ostensibly to differentiate between inconsequential and discriminatory harassment in the workplace.⁶ The requirement has not simplified the inquiry, from a legal perspective. Courts have promul-

(Proceedings of Sex and Power Issues in the Workplace, Bellevue, WA); LaFontaine & Trudeau, *The Frequency, Sources and Correlates of Sexual Harassment Among Women in Traditional Male Occupations*, 15 Sex Roles 423 (1986); Mansfield, Koch, Henderson, Vicary, et al., *The Job Climate for Women in Traditional Male Blue Collar Occupations*, 25 Sex Roles 63 (1991).

⁶ Initially, the courts of appeals that discussed the potential psychological impact of workplace harassment on workers did so to explain why hostile work environment actions were cognizable under Title VII, even in the absence of any specific economic detriment. See, e.g., *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972); *Bundy v. Jackson*, 641 F.2d 934, 944 (D.C. Cir. 1981). Some courts later appropriated the language of psychological injury to interpose a requirement in all cases that plaintiffs bringing such actions must show that the workplace psychologically injured the plaintiff and/or would have injured a reasonable employee. See, e.g., *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 619-20 (6th Cir. 1986) (sexual harassment); *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1271-73 (7th Cir. 1991), cert. denied, 481 U.S. 1041 (1987) (racial harassment).

gated various formulations, which describe quite different levels of injury.⁷ Further complicating the profusion of "psychological injury" formulations is their application. Of the courts of appeals adopting some kind of psychological injury requirement, only two—the Sixth and Seventh Circuits—appear to have relied on the requirement to deny recovery in a sexual harassment case.⁸ None has relied on the requirement to deny recovery to a plaintiff asserting racial harassment.

Scientific research suggests that a psychological injury requirement is not an adequate or even useful measure of what the courts of appeals use it to measure: sexual harassment sufficiently severe or persistent to alter conditions of employment.⁹ The research further indicates that requiring proof of psychological injury is likely to impede

⁷ The Sixth Circuit defines a hostile work environment as one that would "affect seriously the psychological well-being of [a] reasonable person under like circumstances" and has in fact inflicted "some degree of injury" on the plaintiff. *Rabidue*, 805 F.2d at 620. The Third Circuit has said an actionable work environment is one that actually injured the plaintiff and would affect "the psychological stability" of a reasonable employee. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482-83 (3d Cir. 1990). The Seventh Circuit initially adopted a test requiring "such anxiety and debilitation to the plaintiff that working conditions were 'poisoned'." *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 213 (7th Cir. 1986). More recent decisions have muddled that circuit's standard. See *Brooms v. Regal Tube Co.*, 881 F.2d 412, 418-19 (7th Cir. 1989) (embracing *Scott* and *Rabidue* standards simultaneously). The Federal Circuit has held that harassers may not be punished for violating Title VII absent proof that the plaintiff suffered "serious psychological damage." *Downes v. FAA*, 775 F.2d 288, 295 (Fed. Cir. 1988). And in *Vance v. Southern Bell Tel. and Tel. Co.*, 863 F.2d 1503, 1509-10 (11th Cir. 1989), the Eleventh Circuit adopted as interchangeable both the "affect seriously the psychological well-being of [an] employee" test and the "affect the psychological stability of [an] employee" test.

⁸ See *Scott*, 798 F.2d at 214; *Rabidue*, 805 F.2d at 622.

⁹ See, e.g., *Scott*, 798 F.2d at 213; *Rabidue*, 805 F.2d at 620.

discovery and correction of conditions that genuinely interfere with equal employment opportunity and is also likely to reduce significantly Title VII's efficacy in eradicating a major barrier to equal employment opportunity.

For these reasons, APA urges the Court to rule that "psychological injury" is *not* an element of a hostile work environment claim and to hold that harassing conduct is actionable if it is severe and/or pervasive enough to provide different conditions and privileges of work to members of a protected class than to other employees. Point I.

In addition, APA submits social science data about men's and women's differing perceptions of sexual harassment as a factor the Court may find helpful in fashioning an objective test for determining whether a work environment is actionable under Title VII. Point II.

I. INCLUDING PSYCHOLOGICAL INJURY AS AN ELEMENT OF A HOSTILE WORK ENVIRONMENT CLAIM FRUSTRATES TITLE VII'S PURPOSES AND DOES NOT EFFECTIVELY IDENTIFY CASES IN WHICH EQUAL EMPLOYMENT OPPORTUNITY IS DENIED.

A. A Psychological Injury Requirement Insulates from the Reach of Title VII Many Instances in Which Equal Employment Opportunity is Denied.

Congress intended Title VII's proscription of discrimination on the basis of gender "to strike at the entire spectrum of disparate treatment of men and women in employment." *Vinson*, 477 U.S. at 64. The law "affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id.* at 65. This rule plainly serves Title VII's overriding purpose of equal employment opportunity for women and men.

The psychological injury requirements adopted by the Sixth Circuit and others undermine that overriding pur-

pose. Requiring protected classes of workers to endure intimidation and insult unless and until they become psychologically debilitated, destabilized, or seriously injured subverts Congress' goal.

Scientific research demonstrates that workplace sexual harassment inflicts substantial non-psychological injuries on its targets. Studies of the effects of sexual harassment on employees have established that the cost in employment opportunities for the worker (and in added costs to the employer) is high. Victims of sexual harassment frequently change jobs, transfer, or abandon efforts to obtain jobs in order to avoid harassment. In the process, they may lose income, confidence, seniority, references, work alliances, and the advantage of an established work reputation.¹⁰ Thus, these victims lose an employment opportunity due to precisely the kind of disparity Congress intended to eliminate—typically without receiving any remedy under Title VII.¹¹

Workers who remain and continue to undergo harassment report adverse effects on their work performance

¹⁰ See Koss, *Changed Lives: The Psychological Impact of Sexual Harassment*, in *Ivory Power: Sex and Gender Harassment in the Academy* 78, 80 (M. Paludi, ed.) (1990); Coles, *Forced to Quit: Sexual Harassment Complaints and Agency Response*, 14 *Sex Roles* 81, 86-92 (1986) (study of California Fair Employment Department); Crull, *Stress Effects of Sexual Harassment on the Job*, 52 *Am. J. of Orthopsych.* 539, 541 (1982); Hamilton, Alagna, King & Lloyd, *The Emotional Consequences of Gender-Based Abuse in the Workplace*, in *Women, Power and Therapy* 155, 165-170 (M. Braude ed.) (1987); Gutek, *supra* note 4, at 54; Hesson-McInnis & Fitzgerald, *A Preliminary Test of an Integrative Model* (Nov. 1992) (Paper presented to the 2nd APA/NIOSH Conference on Stress and the Workplace, Washington, DC).

¹¹ While Title VII does provide a remedy for constructive discharge, recovery is predicated on much more extreme conduct, and in some jurisdictions, proof that the employer intended to drive the employee away. See, e.g., *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987).

from deteriorated interpersonal relations at work, decreased feelings of competence and self-esteem, loss of motivation, distraction, and negative performance evaluations from harassers.¹² When harassment excludes women from informal associations with co-workers and supervisors, they lose access to information, feedback, and support, hampering their work performance in subtle but effective ways.¹³ The magnitude of the damage to these victims is reflected in the extent to which sexual harassment also harms their employers. A 1988 United States Merit Systems Board (USMSB) study estimated the cost of sexual harassment to the government (as employer) in just a two-year period at \$267 million.¹⁴

A "psychological injury" requirement thus presents many women with a Hobson's choice: surrender employ-

¹² See Baker, *Sexual Harassment and Job Satisfaction in Traditional and Nontraditional Industrial Occupations* (1989) (unpublished doctoral dissertation, California School of Professional Psychology, Los Angeles); Gutek, *supra* note 4, at 79-82; O'Farrell & Harlan, *Craftworkers and Clerks: The Effects of Male Coworker Hostility on Women's Satisfaction with Nontraditional Jobs*, 29 Soc. Problems 252, 260 (1982); Bandy, *Relationships Between Male and Female Employees at Southern Illinois University* (1989) (unpublished doctoral dissertation, College of Education, Southern Illinois University); Culbertson, Rosenfeld, Booth-Kewley & Magnusson, *Assessment of Sexual Harassment in the Navy: Results of the 1989 Navy-wide Survey* (San Diego, CA NPRDC 1992); Scott, *Long Term Emotional Reactions to Workplace Impact of Sexual Harassment* 70 (March, 1992) (Proceedings of Sex and Power Issues in the Workplace, Bellevue, WA); Gruber, *supra* note 5, at 125-29; Benson & Thomson, *Sexual Harassment on a University Campus*, 29 Soc. Problems 236, 246 (1982).

¹³ See Gutek & Koss, *Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment*, 42 J. of Vocational Behav. 28, 31-32 (1993); S. Martin, *Breaking and Entering: Women on Patrol* 205 (1980); Martin, *Sexual Politics in the Workplace*, 1 Symbolic Interaction 55, 58 (1978); Summers, *Determinants of Judgments and Responses to a Complaint of Sexual Harassment*, 25 Sex Roles 379, 379 (1991).

¹⁴ See *Ellison v. Brady*, 924 F.2d 872, 880 n.15 (9th Cir. 1991).

ment opportunities or remain in the kind of environment Congress intended to eliminate unless or until they suffer psychological injury—in several jurisdictions, "serious" injury or even instability. Surely, Congress cannot have intended for victims of sexual harassment to endure that abuse "until their psychological well-being is seriously affected." *Ellison*, 924 F.2d at 878. "Title VII's protection of employees from sex discrimination comes into play long before the point where victims of sexual harassment require psychiatric [or psychological] assistance." *Id.*

In addition, Congress cannot have intended that victims possessing personal traits permitting them to endure even the most poisoned work conditions without visible psychological deterioration would be denied recourse under Title VII entirely. Although psychological research firmly supports the conclusion that sexual harassment negatively affects the psychological well-being of significant numbers of victims,¹⁵ it does not support the conclusion that the presence and degree of psychological injury effectively measures the severity of the harassment. Indeed, what research exists suggests that other determinative factors

¹⁵ Many studies document that sexual harassment victims frequently experience depression, anxiety, a sense of helplessness, sleep disorders, constriction of affect, gastrointestinal disorders, teeth grinding, eating disorders, and in some cases post traumatic stress disorder. See Malovich & Stake, *Sexual Harassment on Campus*, 14 Psych. of Women Q. 63, 64 (1990); Gutek & Koss, *supra* note 13, at 32-35; Koss, *supra* note 10, at 78-84; Crull, *supra* note 10, at 541-43; Hesson-McInnis & Fitzgerald, *supra* note 10.

The American Psychiatric Association has taken the official position that "sexual harassment and other forms of irrational gender-based employment discrimination are potentially severe occupational stressors." Hamilton & Dolkart, *Working Paper on Legal Reform in the Area of Sexual Harassment* 182, 184 (March, 1992) (Proceedings of Sex and Power Issues in the Workplace, Bellevue, WA).

make such an equation unreliable.¹⁶ A great variety of factors, in addition to severity, influence whether or not a victim will develop psychological injury.

For example, a victim's social support can, to some degree, insulate some victims of harassment from psychological harm. Research on other forms of sexual victimization has shown that victims who receive support from friends and family show better adjustment than those who lack it.¹⁷ A victim's own coping mechanisms may also affect whether she experiences psychological injury as a result of sexual harassment.¹⁸

Other data suggest that women with low self-esteem may experience sexual harassment as more frightening and traumatic.¹⁹ In addition, factors such as prior victimization substantially affect the likelihood of developing

¹⁶ See March, *What Constitutes a Stressor? The "Criterion A" Issue*, in Foa & Davidson, *Post-Traumatic Stress Disorder: DSM-IV and Beyond* (Washington, DC: American Psychiatric Press 1993) (no one-to-one correspondence between severity of stressor and the psychological effect of the stressor).

¹⁷ See Atkeson, Calhoun, Resick & Ellis, *Victims of Rape: Repeated Assessment of Depressive Symptoms*, 50 J. of Consulting and Clinical Psych. 96 (1982); Ruch & Chandler, *Sexual Assault Trauma During the Acute Phase*, 24 J. of Health and Soc. Behav. 174 (1983); Sales & Shore, *Victim Readjustment Following Assault*, 37 J. of Soc. Issues 5 (1984).

Conversely, victims without social support are more likely to demonstrate poor adjustment. See Davis, Brickman & Baker, *Supportive and Unsupportive Responses of Others to Rape Victims*, 19 Am. J. of Community Psych. 443 (1991).

¹⁸ See generally Crocker & Major, *Social Stigma and Self-Esteem: The Self-Protective Properties of Stigma*, 96 Psych. Review 608 (1989) (discussing coping mechanisms used by stigmatized groups to preserve self-esteem); Folkman, Lazarus, Gruen & DeLonges, *Appraisal, Coping, Health Status, and Psychological Symptoms*, 50 J. of Personality and Soc. Psych. 571 (1986) (discussing "escape-avoidance coping strategies").

¹⁹ See Malovich & Stake, *supra* note 15, at 80.

psychological injury as the result of a subsequent traumatic event.²⁰

Thus, the presence and degree of psychological injury to the victim may be more reflective of the victim's characteristics than of the severity of the offending conduct, or the extent of injury to equal employment opportunity. At the very least, research indicates that the characteristics of the victim are factors that significantly detract from the value of psychological injury as a means of gauging the severity of harassment.

The psychological injury requirement thus shifts the focus of Title VII's protection to the victim's psychological wherewithal to sustain abuse, rather than the nature of the harasser's conduct. This shift in focus is ill-conceived and incompatible with Congress' clear intention to eliminate the "arbitrary barrier[s] to sexual equality at the workplace." *Vinson*, 477 U.S. at 67.

Focusing on the victim's psychology rather than the harasser's conduct is also inconsistent with the standard promulgated in *Vinson*. To be sure, this Court held that the conduct must be "unwelcome," *id.* at 68, but that serves simply to distinguish sexual harassment from acceptable expressions of personal and sexual interest. The threshold standard set for actionable unwelcome conduct was conduct that is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." *Id.* at 67. This inquiry is properly centered on the conduct of the harasser.

Courts hewing closely to *Vinson*'s test—without adding a psychological injury requirement—have found it workable and consonant with Congress' purposes. These courts have determined whether conduct was sufficiently

²⁰ See Burgess & Holstrom, *Rape: Sexual Disruption and Recovery*, 49 Am. J. of Orthopsych. 648 (1979); Koss, *Violence Against Women in the Community*, in *No Safe Haven* 12 (1993) (in publication).

severe or pervasive by analyzing the conduct in terms of invasiveness, frequency, number of participants, and other objective indicia pertaining to the harasser's conduct.²¹ The Equal Employment Opportunity Commission (EEOC), in its 1990 policy guidelines, expressly rejected any psychological injury requirement as an element of a hostile work environment claim under Title VII, explaining that "it is the Commission's position that it is sufficient for the charging party to show that the harassment was unwelcome and that it would have substantially affected the work environment of a reasonable person."²² This approach is far more consistent with Congress' goals in Title VII than the "psychological injury" requirements added by other courts of appeals.

B. A Psychological Injury Requirement Further Undermines Title VII's Purposes by Deterring Reporting of Severe Sexual Harassment and Discouraging Recourse to Title VII.

Psychological research also indicates that adopting a psychological injury requirement for hostile work environment claims will deter reporting of even severe sexual harassment, and will therefore result in less impetus to employers to adopt and consistently enforce workplace rules prohibiting sexual harassment.

²¹ See, e.g., *Kotcher v. Rosa and Sullivan Appliance Ctr., Inc.*, 957 F.2d 59 (2d Cir. 1992); *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985); *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); *Hall v. Gus Constr. Co.*, 842 F.2d 1010 (8th Cir. 1988). The "welcomeness" component of the inquiry has less utility when the conduct complained of belittled and insulted the plaintiff on the basis of plaintiff's gender (as in this case), race, religion, or national origin, which courts generally presume is unappreciated.

²² See EEOC Policy Guidance on Sexual Harassment 28 n.20 (March 19, 1990). See also *Ellison v. Brady*, 924 F.2d at 877-78 (rejecting the *Scott* and *Rabidue* standards and holding that no showing of psychological injury is required by Title VII).

It is plain that any obstacle placed in the path of recovery will result in fewer successful suits and less concern on the part of employers. Psychological research suggests, moreover, that the impact of a psychological injury requirement may not only be greater than might be expected but particularly inimical to the purposes of Title VII. Critically, research shows that women who are most likely to experience psychological problems in response to sexual harassment—those with low self-esteem—are also the least likely to report the harassment.²³ Women with high self-esteem, on the other hand, appear to be both better able to cope psychologically with identical work environments and more likely to complain to someone in authority.²⁴

This research suggests that those most likely to suffer psychological harm are most likely to do so in silence. They are less likely to seek help from authorities to put an end to the conduct that is harming them. Those least likely to actually suffer psychological damage, by contrast, are positioned to perform a valuable service by helping to end discriminatory harassment, not only for themselves but for those suffering precisely the type of psychological injury that has concerned several of the courts of appeals. But a psychological injury requirement bars such plaintiffs from recovering for their own discriminatory

²³ See, e.g., *Malovich & Stake*, *supra* note 15, at 76, 78, 80 (finding that women with low self-esteem are most at risk to the psychological dangers of harassment and least likely to report it); Gutek & Koss, *supra* note 13, at 41 (women with low self-esteem are least likely to report sexual harassment to someone in authority); *Treatment and Counseling Needs of Women Veterans Who Were Raped, Otherwise Sexually Assaulted, or Sexually Harassed During Military Service: Hearings Before the Senate Comm. on Veterans' Affairs*, 102nd Cong., 2nd Sess. (June 30, 1992) (prepared testimony of Dean G. Kilpatrick, Ph.D.) (sexually harassed women suffering from post trauma stress disorder are least likely to have filed a complaint).

²⁴ See *Malovich & Stake*, *supra* note 15, at 76, 78, 80; see also Koss, *supra* note 10, at 77.

treatment, and thereby protects harassers who, in all probability, are also harassing and psychologically injuring women employees less willing or able to assert themselves.²⁵

Research also shows that forcing victims to litigate the issue of their own psychological injury is likely to deter victims generally from pursuing remedies under Title VII. Studies of sexual harassment have shown consistently that only a small fraction of sexually harassing behavior is reported to anyone in authority.²⁶ Victims explain that they choose not to report harassment in order to avoid the humiliation and social stigma of showing they were not able to cope with the experience,²⁷ because of the traditional view that the victim is a failure,²⁸ and because they fear nothing will be done in any event.²⁹ Research has shown that the need to prove psychological injury further pressures victims to forsake help because portraying themselves as mentally ill undermines their "credibility and competence as a person and as an employee,"³⁰

²⁵ See Gutek, *supra* note 4, at 62 (71 percent of sexual harassment victims reported that others in the workplace were harassed by the same person).

²⁶ See Gutek & Koss, *supra* note 13, at 39 (USMSPB 1981 study found only 2% took official action); Valentine-French & Radtke, *Attributions of Responsibility for an Incident of Sexual Harassment in a University Setting*, 21 *Sex Roles* 545, 545-46 (1989); Hamilton & Dolkart, *supra* note 15, at 187 (USMSPB 1988 study found 5% filed a complaint); Fitzgerald & Shullman, *supra* note 3, at 6 (less than 5%); Gutek, *supra* note 4, at 71; Reilly, Lott & Gallogly, *Sexual Harassment of University Students*, 15 *Sex Roles* 333, 355 (1986).

²⁷ See Koss, *supra* note 10, at 74; Gutek, *supra* note 4, at 72.

²⁸ See Koss, *supra* note 10, at 74; Hamilton & Dolkart, *supra* note 15, at 187.

²⁹ See Lee & Heppner, *The Development and Evaluation of a Sexual Harassment Inventory*, 69 *J. of Counseling and Dev.* 512, 512 (July/August 1991); Gutek, *supra* note 4, at 71-72.

³⁰ Gutek & Koss, *supra* note 13, at 30-31.

enables defendants to argue that the complainant has always been fragile or damaged,³¹ and opens their entire mental health and sexual history for examination.³²

Moreover, the process entailed in proving psychological injury may itself exacerbate any injury already suffered. Two prominent researchers in the field have concluded that "a reliance on the existence of negative outcomes as proof of the allegation of harassment has contributed to the retraumatization of harassment victims."³³ Inducing underreporting of severe or persistent sexual harassment at the workplace and inflicting unnecessary harm on victims of workplace harassment are contrary to the goals of Title VII.

C. A Psychological Injury Requirement Weakens Title VII's Power to Eliminate Discriminatory Harassment in the Workplace.

Recent research findings strongly suggest that men who are highly likely to sexually harass women are more likely to do so in circumstances where such behavior is accepted or condoned.³⁴ By focusing on potential harassers instead of victims, some researchers have added a new layer to our understanding of the phenomenon. For instance, men who describe themselves as likely to engage in conduct which would be considered sexual harassment are also more likely to describe sexual relations in general as adversarial and exploitative, to espouse the opinion that women like to be dominated and subjected to physical coercion, and to express a willingness to rape if assured

³¹ See *id.* at 44.

³² See Hamilton & Dolkart, *supra* note 15, at 192.

³³ Gutek & Koss, *supra* note 13, at 44.

³⁴ See Pryor & Stoller, *Sexual Cognition: Men Who are High in the Likelihood to Sexually Harass*, *Personality & Soc. Psych. Bulletin* (accepted for publication 1993); see also Gutek, *supra* note 4.

that they would not be punished.³⁵ Survey and laboratory research indicates that sexual harassment is far less likely when organizational norms do not encourage such behavior.³⁶

Although research in this area has only begun, the evidence supports the intuitively plausible view that an employer's reasonable efforts to stop harassment and provide good role models is a powerful curb. It is also consistent with more general historical experience, which indicates people are deterred by a high likelihood that they will be punished.³⁷ The corollary also appears to be true: crime increases when police are absent.³⁸ Clear indications from management that sexual harassment is not tolerated can be expected, therefore, to significantly constrain the behavior of men who in other circumstances would be harassers.

Title VII, by subjecting employers to potential liability for the acts of their employees, can be a significant impetus for employers to set and enforce strong anti-harassment policies. Many institutions developed some form of anti-harassment program after this Court's decisions that sexual harassment is a form of discrimination.³⁹

³⁵ See Pryor, *Sexual Harassment Proclivities in Men*, 17 Sex Roles 269, 277-78 (1987); Reilly, Lott, Caldwell & DeLuca, *Tolerance for Sexual Harassment Related to Self-Reported Sexual Victimization*, 6 Gender and Soc'y 122, 133-36 (March 1992).

³⁶ See Pryor, LaVite & Stoller, *A Social Psychological Analysis of Sexual Harassment*, 42 J. of Vocational Behav. 68, 70-71 (1993); Bond, *Division 27 Sexual Harassment Survey*, 21 The Community Psychologist 7, 8 (1988); Hesson-McInnis & Fitzgerald, *supra* note 10 (reanalyses of 1988 USMPB data).

³⁷ See Sellin, *The Law and Some Aspects of Criminal Conduct*, in *Aims & Methods of Legal Research* 113, 119-120 (1955).

³⁸ See F. Zimring & G. Hawkins, *Deterrence: The Legal Threat in Crime Control* 158-172 (1973).

³⁹ See, e.g., Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 Am. Psychologist 497, 497-500 (May 1991); Gutek & Koss, *supra* note 13, at 36.

Including a psychological injury requirement as an element of a Title VII hostile work environment claim, however, substantially weakens the impact of Title VII by rendering recovery less likely and less predictable.

In addition, such a requirement may weaken the impact of Title VII by inducing women to abandon jobs where sexual harassment is not curtailed instead of acting to change the situation. Empirical research suggests that male-dominated workplaces have the highest incidence of sexual harassment, and work environments containing roughly equal numbers of male and female employees have the least.⁴⁰ This suggests that the employment conditions leading Congress to prohibit discrimination on the basis of sex will be significantly ameliorated if Title VII itself is applied with sufficient force and consistency that women will be encouraged to enter and remain in workplaces initially dominated by men.

II. WOMEN AND MEN DIFFERENTLY PERCEIVE BEHAVIOR THAT CAN BE CHARACTERIZED AS SEXUAL HARASSMENT.

Many courts of appeals, in determining whether particular conduct is sufficiently severe or persistent to alter conditions of employment, have expressly applied an objective test to hostile work environment claims. They have done so to protect employers from liability for the reactions of hypersensitive or eccentric employees. There is not, however, complete agreement among the circuits as to the nature of the objective standard to be applied. Consistent with ordinary tort principles, some courts have

⁴⁰ See Baker, *supra* note 12; Konrad & Gutek, *Impact of Work Experiences on Attitudes Toward Sexual Harassment*, 31 Admin. Sci. Q. 422, 437 (Sept. 1986) (citing 1982 study by Gutek & Morasch); Ellis, Barak & Pinto, *Moderating Effects of Personal Cognitives on Experienced and Perceived Sexual Harassment of Women at the Workplace*, 21 J. of Applied Soc. Psych. 1320, 1322 (1991); see also note 5, *supra*.

taken the victim's gender into account in evaluating the conduct; others have not.⁴¹ In deciding which test to adopt, the Court may wish to consider data suggesting that men and women tend to evaluate sexual behavior in the workplace dissimilarly.

Survey and laboratory research has generally shown that women are more likely than men to label sexually aggressive behavior at work as harassment.⁴² There is a gap between men's and women's perceptions with respect to every category of sexual harassment, but the gap is most pronounced with respect to gender-based insults and ridicule and less explicit forms of sexual advances.⁴³ Studies also show that men are more likely to be tolerant

⁴¹ The alternatives are often described as a reasonable victim standard versus a reasonable person standard. Some have proposed a reasonable woman standard instead of a reasonable victim standard. The phrase "reasonable victim standard," however, takes into account that, although women are overwhelmingly the victims of sexual harassment, *see* Fitzgerald & Shullman, *supra* note 3, at 6, harassment of men by other men or by women is not unknown.

⁴² *See* Fitzgerald & Ormerod, *Perceptions of Sexual Harassment: The Influence of Gender and Context*, 15 *Psych. of Women Q.* 281, 289-90 (1991); Gutek, *supra* note 4, at 43; Hartnett, Robinson & Singh, *Perceptions of Males and Females Toward Sexual Harassment and Acquiescence*, 4 *J. of Soc. Behav. and Personality* 291, 295 (1989); Valentine-French & Radtke, *supra* note 26, at 552; Kenig & Ryan, *Sex Differences in Levels of Tolerance and Attribution of Blame for Sexual Harassment on a University Campus*, 15 *Sex Roles* 535, 537-38 (1986); Padgitt & Padgitt, *Cognitive Structure of Sexual Harassment*, 27 *Student Personnel* 34, 38 (1986). A few studies have not replicated these findings. Non-representative samples may account for these results. *See* Terpstra & Baker, *supra* note 4, at 604 (attributing the result to exclusive use of college students as subjects); Malovich & Stake, *supra* note 15, at 78 (attributing the result to sample controlled for equivalent numbers of men and women with traditional or liberal sex role attitudes).

⁴³ *See* Fitzgerald & Shullman, *supra* note 3, at 12; Hartnett, Robinson & Singh, *supra* note 42, at 293; Fitzgerald & Ormerod, *supra* note 42, at 291.

of sexual harassment than women.⁴⁴ One study, for example, concluded that men were four times more likely than women to predict they would be flattered by sexual overtures at work and four times less likely to predict they would be insulted.⁴⁵

Although there is considerable empirical data establishing the differential, there is less understanding of why such a differential exists. The Ninth Circuit has suggested that the unprecedented levels of rape and sexual assault in this country may cause many women to worry whether a harasser's conduct is a prelude to violence. *Ellison v. Brady*, 924 F.2d at 879. Konrad and Gutek have suggested that women may view sexual overtures as threatening to their positions at work.⁴⁶ Studies show that women are nine times more likely to have quit a job than men because of sexual harassment, five times more likely to have transferred, five times more likely to have stopped looking for a job, and three times more likely to have been fired.⁴⁷ It also appears that sexual liaisons with co-workers raise a man's status in the work organization but lower a woman's status.⁴⁸ Malovich and Stake have suggested that a major factor explaining perceptions

⁴⁴ *See* Lott, Reilly, & Howard, *Sexual Assault and Harassment*, 8 *Signs* 296, 312-13 (1982); Reilly, Lott, Caldwell & DeLuca, *supra* note 35, at 132.

⁴⁵ *See* Gutek, *supra* note 4, at 96; Konrad & Gutek, *supra* note 40, at 423.

⁴⁶ Consistent with this assertion, research has found that sexual advances from a person in authority are viewed as more personally threatening to women than to men. *See* Pryor & Day, *Interpretations of Sexual Harassment: An Attributional Analysis*, 18 *Sex Roles* 405, 409, 414 (1988).

⁴⁷ *See* Konrad & Gutek, *supra* note 40, at 432.

⁴⁸ *See* Quinn, *Coping with Cupid*, 22 *Admin. Sci. Q.* 30, 51 (1977); Farley, *Sexual Shakedown: The Sexual Harassment of Women on the Job* (1978).

of harassment is sex role attitudes, and that more men have traditional sex role attitudes than women.⁴⁹

Related studies have shown that men are significantly more likely to attribute the causes of harassing behavior to characteristics of the victim, while women are more likely to attribute the causes to characteristics of the perpetrators.⁵⁰ Men are also more likely than women to attribute harassment complaints to an external factor, such as career competition between the complainant and the alleged perpetrator.⁵¹ Several researchers have suggested that these results are consistent with notions of harm avoidance and blame avoidance. More women fear victimization and more men fear being accused of harassment.⁵²

The courts of appeals are split on the appropriate reasonableness standard for assessing whether given conduct is sufficiently severe and pervasive to violate Title VII.⁵³ Evidence from social science research indicates that the choice of a reasonableness standard will measurably affect the results generated.

⁴⁹ Malovich & Stake, *supra* note 15, at 78.

⁵⁰ See Jensen & Gutek, *Attributions and Assignment of Responsibility in Sexual Harassment*, 38 J. of Soc. Issues, 121, 124-26 (1982); Summers, *supra* note 13, at 389; Valentine-French & Radtke, *supra* note 26, at 380-81.

⁵¹ See Summers, *supra* note 13, at 380-81, 389.

⁵² See, e.g., Valentine-French & Radtke, *supra* note 26, at 552-53; Riger, *supra* note 39, at 499.

⁵³ The Seventh Circuit has said that the conduct is to be viewed from the point of view of a reasonable person. See *Brooms*, 881 F.2d at 418, 420. The Third, Fifth, Sixth, and Ninth Circuits have expressly adopted a reasonable victim standard, as has the EEOC. See EEOC Policy Guidance, *supra* note 22, at 28; *Andrews*, 895 F.2d at 1482-83; *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988), *cert. denied*, 489 U.S. 1020 (1989); *Yates*, 819 F.2d at 637; *Ellison*, 924 F.2d at 878-79.

CONCLUSION

For the foregoing reasons, APA respectfully submits that a psychological injury requirement is inconsistent with the purposes of Title VII. Congress designed Title VII to bring about the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Social science research provides considerable support for the efficacy of imposing legal sanctions on employers for creating or tolerating an "intimidating, hostile, or offensive working environment." *Vinson*, 477 U.S. at 65. Hinging sanctions on a psychological injury requirement, however, substantially subverts their effectiveness. Differentiation between actionable harassment and trivial misconduct can be and should be determined on the basis of the nature and pervasiveness of the conduct itself. Hostile or offensive conduct which is severe or persistent is an "arbitrary barrier to sexual equality at the workplace," *Vinson*, 477 U.S. at 67, regardless of the victim's psychological condition or willingness to display it.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

TERESA HARRIS,

Petitioner,

—v.—

FORKLIFT SYSTEMS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE

**NOW LEGAL DEFENSE AND EDUCATION FUND, CATHARINE
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AMERICAN LEGAL DEFENSE AND EDUCATION FUND,
ASSOCIATION FOR UNION DEMOCRACY, THE CENTER FOR
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INTEREST OF AMICI CURIAE

Amici Curiae file this brief in support of petitioner. The specific statements of Amici Curiae are set forth in the Appendix.¹

SUMMARY OF ARGUMENT

In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), this Court held that Title VII protects women from sexually harassing conduct that creates a hostile work environment. To establish liability for hostile work environment sexual harassment a plaintiff must prove that unwelcome sex-based conduct altered the "terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1). *Meritor* instructs that a plaintiff has established actionable sexual harassment when the conduct: (1) was so severe or pervasive as to alter the conditions of employment, creating an abusive working environment, *or* (2) had the purpose or effect of unreasonably interfering with her work performance, *or* (3) had the purpose or effect of creating an intimidating, hostile, or offensive working environment. *Meritor*, 477 U.S. at 65-67.

In the instant case and in previous cases, the Sixth Circuit has deviated from the standard which this Court set in *Meritor* by imposing additional and more stringent requirements for plaintiffs to establish hostile work environment sexual harassment under Title VII. Following its holding in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987), the Sixth Circuit requires that a plaintiff prove that she suffered serious psychological injury as a result of the harassment and satisfy a reasonable person standard. The Sixth Circuit's extra requirements thwart the goals of Title VII and violate the standards this Court set in *Meritor*. The Sixth Circuit's analysis focuses on the plaintiff's percep-

¹ Amici Curiae file this brief with the consent of all parties. Letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

tion of and reaction to discrimination, not upon the defendant's conduct. This Court should reaffirm its holding in *Meritor*, stating a test which focuses on the defendant's conduct to assess liability in Title VII sexual harassment claims.

In enacting and implementing Title VII, Congress and this Court have recognized that the harm of discrimination is the discrimination itself. This Court should strike down any test which ignores the inherent harm of discrimination and forces plaintiffs to prove serious psychological injury and/or satisfy a reasonableness standard to establish liability in a sexual harassment case.

ARGUMENT

POINT I

A SEXUAL HARASSMENT TEST THAT FOCUSES ON THE EMPLOYEE RATHER THAN ON THE HARASSING CONDUCT THWARTS THE GOALS OF TITLE VII

A. This Court Correctly Defined The Standards For Hostile Work Environment Liability In *Meritor Savings Bank v. Vinson*

Congress's objective in enacting Title VII was to promote equal employment opportunity by eliminating all "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification[s]" in the workplace. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Harassment by an employer based on race, sex, ethnicity, or religion deprives workers of their right to participate in the workforce on an equal footing with others. *Meritor*, 477 U.S. at 64; see also *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 230 n.13 (1982) (" 'Most people just want to work. That is all. They want an opportunity to work. [Congress is trying to see

that all people], no matter of what race, sex, or religious or ethnic background, will have equal opportunity in employment.' ") (quoting 118 Cong. Rec. 7569 (1972)). Specifically, recognition of the right to work in an environment free of sexual harassment is mandated by Title VII's goal of striking at " 'the entire spectrum of disparate treatment of men and women' in employment." See *Meritor*, 477 U.S. at 64 (quoting *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

Liability for sexual harassment under Title VII may be predicated on either of two types of conduct: (1) harassment in which the grant or denial of concrete employment benefits are conditioned on sexual favors ("*quid pro quo*" sexual harassment), or (2) harassment that, while not necessarily directly affecting economic benefits, creates a hostile or offensive working environment.² *Meritor*, 477 U.S. at 65. In explaining hostile work environment sexual harassment, this Court cited with approval the E.E.O.C. Guidelines, *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982), and *Rogers v. E.E.O.C.*, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972). Looking to these three sources, this Court gave the guidance necessary for a trier of fact to determine whether a hostile work environment sexual harassment claim had been established. The *Meritor* Court discussed approvingly the definition set forth in the E.E.O.C. Guidelines for hostile work

² The defendant's conduct may violate *quid pro quo* or hostile environment sexual harassment or fall somewhere in between on a continuum of conduct. The E.E.O.C. recognized this continuum when it adopted its Guidelines, which state that hostile work environment sexual harassment may be shown by any one of three results: "(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a) (1983).

environment sexual harassment that unwelcome sex-based harassment is unlawful if " 'such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.' " *Meritor*, 477 U.S. at 65 (citation omitted). The *Meritor* Court also cited *Henson* for the proposition that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' " *Id.* at 67. This Court also noted that the Fifth Circuit in *Rogers* first recognized the hostile work environment cause of action, holding that

a Hispanic complainant could establish a Title VII violation by demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele. . . . The phrase "terms, conditions, or privileges of employment" in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.

Meritor, 477 U.S. at 66 (citation omitted). Elaborating on the guidance provided by *Rogers*, this Court specifically concluded that sexual harassment should be evaluated by the same standards as racial harassment.³

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as

³ Recently, this Court reaffirmed the *Meritor* ruling that racial and sexual harassment claims should be evaluated by the same standards. *Patterson v. McLean Credit Union*, 491 U.S. 164, 180 (1989).

demeaning and disconcerting as the harshest of racial epithets.

Id. at 66-67 (quoting *Henson*, 682 F.2d at 902) (emphasis in original).

The *Meritor* Court directed the trier of fact to pursue a fact-based inquiry to determine whether the alleged harassing conduct altered the terms, conditions, or privileges of the plaintiff's employment in violation of Title VII. Courts should consider the severity and pervasiveness of the acts, the meaning of such acts in light of the history of discrimination implicated in the charge, and the context in which these acts occur. *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) ("the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct"). In fact, courts applying *Meritor* have analyzed pervasiveness by examining the number and frequency of specific alleged harassing acts, and have analyzed severity by examining the egregiousness of the acts. *Carrero v. New York City Housing Auth.*, 890 F.2d 569, 577 (2d Cir. 1989) (pervasiveness); *Ellison*, 924 F.2d at 878 (9th Cir. 1991) (pervasiveness); *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1511 (11th Cir. 1989) (severity). While courts have stated that a single racial or sexual epithet, without more, is unlikely to give rise to liability, *Ellison*, 924 F.2d at 876 (quoting *Meritor*, 477 U.S. at 67); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir. 1987), courts also recognize that where the alleged conduct was highly threatening to members of the protected group, a one time or infrequent occurrence would suffice. *Vance*, 863 F.2d at 1511. Finally, these considerations must be evaluated under the totality of the circumstances. *Meritor*, 477 U.S. at 69.

By fashioning a test which recognizes that liability for sexual harassment may be predicated upon a hostile work environment, this Court defined the range of sexual harassment claims actionable under Title VII and acknowledged that harassing behavior based upon an employee's sex is a significant impediment to the employee's ability to succeed in the

work environment. *Meritor*, 477 U.S. at 66-67 (citing *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)). Harassment works to remove members of protected groups from the workplace or to hinder their effective and equal participation, thereby impeding them from having access to equal opportunity in the workplace.⁴ *Meritor*, 477 U.S. at 66-67. Sexual harassment of women perpetuates the historical power imbalance between women and men in the work setting.⁵ Sexual harassment can communicate that women are objects of sexual aggression, submissive to male desires, and valued for their sexual attributes rather than for that which they can offer as credible co-workers. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1526 (M.D. Fla. 1991) (citing Kathryn Abrams, *Symposium: The State of the Union: Civil Rights:*

⁴ Different surveys have found that anywhere from 42 percent to 88 percent of women report experiencing sexual harassment in the workplace. Mark Pazniokas, *Capitol Confronts Sexual Coercion*, THE HARTFORD COURANT, Feb. 13, 1993 at A1. Most victims of sexual harassment are women. Less than one percent of sexual harassment charges involve women as alleged perpetrators. Peg Meier, *New Awareness Has More Men Charging Harassment*, STAR TRIBUNE, Sept. 14, 1992 at 1E; see also U.S. Merit Systems Protection Board, *Sexual Harassment In the Federal Workplace: Is It a Problem?* 33-40 (1981) (sexual harassment of women in the federal government is widespread); U.S. Merit Systems Protection Board, *Sexual Harassment In the Federal Government: An Update* 11-22 (1988) (sexual harassment of women in the federal government is still widespread).

⁵ The effects of the historical power imbalance between men and women are clear in the traditionally male workplace. In addition to performing the tasks which their male peers must perform, women in non-traditional jobs often have to successfully contend with sexual harassment to achieve the same level of success. A recent survey by Chicago Women in Trades of 182 women who worked in traditionally male trade industries (including plumbers, electricians, carpenters, fire fighters, and police officers) revealed that 88 percent of these women were exposed to pictures of naked or partially dressed women in the workplace, 83 percent received unwelcome sexual remarks, and 57 percent were subjected to offensive touching or requests for sex. Laurie W. LeBreton and Sara S. Loevy, *Breaking New Ground: Worksite 2000, A Report Prepared by Chicago Women in Trades* 1, 6-9 (1992).

Gender Discrimination and the Transformation of Workplace Norms, 42 Vand. L. Rev. 1183, 1212 n.118 (1989)), *appeal pending*, (11th Cir. argued Dec. 2, 1992). Further, harassment can be "highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity and without the barrier of sexual differentiation and abuse." *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988); see also *Ellison*, 924 F.2d 872, 879 n.9 (9th Cir. 1991). It is precisely this perpetuation of inequality between men and women in the workplace which Title VII was intended to redress.

B. The Sixth Circuit's Additional And More Stringent Requirements To Establish Hostile Work Environment Liability Are Improper And Should Be Reversed

In the pending case, *Harris v. Forklift Systems, Inc.*,⁶ the courts below applied the Sixth Circuit requirements set forth in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). *Rabidue* and its progeny acknowledge that sexual harassment based on a hostile or abusive work environment violates Title VII, but depart significantly from the standards this Court set forth in *Meritor*. *Harris*, at A-14-15 (citing *Rabidue*, 805 F.2d at 620).

The *Rabidue* court created a restrictive test for evaluating whether the alleged harassing conduct altered the "terms, conditions, and privileges of employment:" "the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance *and* creating an intimidating, hostile, or offensive working environment that affected seriously the psycho logical [sic] well-being of the plaintiff." *Rabidue* 805 F.2d at 618-20 (emphasis added) (citation omitted). In

⁶ *Harris v. Forklift Sys., Inc.*, No. 3-89-0557, 1990 U.S. Dist. LEXIS 20115 (M.D. Tenn. Nov. 27, 1990), *adopted by*, No. 3-89-0557, 1991 U.S. Dist. LEXIS 20940 (M.D. Tenn. Feb. 4, 1991), *aff'd*, 976 F.2d 733 (6th Cir. 1992) (appended to the Petition for Writ of Certiorari to the United States Court of Appeals For Sixth Circuit) (hereinafter cited to as *Harris*, at A-___).

addition, the *Rabidue* court stated that a plaintiff may not prevail in a hostile work environment sexual harassment claim "in the absence of conduct which would interfere with th[e] hypothetical reasonable individual's work performance and affect seriously the psychological well-being of that reasonable person under like circumstances."⁷ *Id.* at 620.

The Sixth Circuit's deviation from the test promulgated in *Meritor* reveals significant misunderstandings about the nature of sexual harassment. In *Meritor*, this Court did not impose a duty upon claimants to prove serious psychological injury or to meet a reasonableness standard. Any test for sexual harassment liability that requires plaintiffs to prove the extent of their injury as a result of the consequences of discrimination improperly requires courts to focus on the plaintiff instead of on the defendant's conduct.⁸

⁷ A number of courts have explicitly or implicitly declined to adopt some or all of the restrictive standards set forth in *Rabidue*. See *Ellison*, 924 F.2d at 877 (expressly declining to follow *Rabidue* standards); *Carrero v. New York City Housing Auth.*, 890 F.2d 569, 577-78 (2d Cir. 1989) (no requirement of serious psychological injury or satisfaction of a reasonable person standard); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482, 1485 (3d Cir. 1990) (expressly rejecting *Rabidue* by holding derogatory language and pornography in workplace can violate Title VII, but applying "psychological stability" and "reasonable person of the same sex" language); *Bennett v. Corroon & Black Co.*, 845 F.2d 104 (5th Cir. 1988) (no requirement of serious psychological injury or satisfaction of a reasonable person standard); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987) (same); *Robinson*, 760 F. Supp. at 1525-27 (rejecting *Rabidue* reasoning and result but applying court's own subjective and objective test; finding serious psychological injury and satisfaction of a reasonable woman standard). But see *Brooms v. Regal Tube Co.*, 881 F.2d 412, 418-19 (7th Cir. 1989) (citing *Rabidue* standard with approval).

⁸ Testimony by the victim about the harassing conduct and how it affected the victim's work environment is relevant evidence in a sexual harassment case. The court should, in fact, take into account the victim's perspective and circumstances in analyzing the conduct. See *Ellison v. Brady*, 924 F.2d 872, 878-79 (9th Cir. 1991). The evaluation is gender-neutral in the sense that a man may prove discrimination under the same

In *Davis v. Monsanto Chemical Co.*, 858 F.2d 345 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989), the Sixth Circuit implicitly recognized the impropriety of the *Rabidue* holding and refused to apply the restrictive standard set forth in *Rabidue* in a racial hostile work environment case. The court thus revealed its discomfort in applying the restrictive *Rabidue* test where the factual circumstance concerned a form of discriminatory abuse of which the court disapproved. The *Davis* court created a false distinction between the standards applicable for race- and sex-based hostile work environment claims. In making such a distinction, *Davis* departed from the holding in *Meritor*, which expressly equated the standards for proving sexual harassment and racial harassment.⁹ *Meritor*, 477 U.S. at 67.

standard. But it is not gender-blind in the sense that the court should not ignore the harmful effects of a long history of discrimination in assessing the meaning and seriousness of alleged discriminatory conduct. As one commentator observed,

A woman struggling to establish credibility in a setting in which she may not be, or may not feel, welcome, can be swept off balance by a reminder that she can be raped, fondled, or subjected to repeated sexual demands. . . . The feelings of anxiety, fear, or vulnerability produced by the specter of sexual coercion prevent women from feeling, or being viewed as, the equals of their male counterparts in the workplace.

Kathryn Abrams, *Symposium: The State of the Union: Civil Rights: Gender Discrimination and the Transformation of Workplace Norms*, 42 Vand. L. Rev. 1183, 1208 (1989); see also *Ellison*, 924 F.2d at 879.

⁹ Another Sixth Circuit panel expressly rejected *Davis'* distinction between racial and sexual harassment, noting that *Davis* "was a departure from the standard intended to be applicable to both racial and sexual harassment causes of action predicated upon a pervading hostile climate within the workplace generally. . . ." *Risinger v. Ohio Bureau of Workers' Compensation*, 883 F.2d 475, 485 (6th Cir. 1989).

1. Liability In Sexual Harassment Cases, Like Other Discrimination Cases, Turns On The Harmful Nature Of The Discriminatory Conduct

The appropriate standard in sexual harassment cases is one which recognizes that sexual harassment is akin to other types of discrimination. For example, plaintiffs in Title VII disparate treatment cases are not required to make any showing of the consequences of invidious differential treatment, such as mental anguish or psychological harm, to establish liability. Even in Title VII disparate impact cases, in which proof of discriminatory intent is not required, plaintiffs are not required to show that they suffered any harm in addition to the harm of subjection to a discriminatory employment practice. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

In this respect, Title VII law converges with constitutional discrimination law. For example, in *Brown v. Board of Education*, 347 U.S. 483 (1954), the plaintiffs were not required to prove the individual consequences of the injury they suffered by being forced to attend segregated schools. Rather, this Court recognized that segregation was itself injurious because "[s]eparate educational facilities are inherently unequal." *Id.* at 495. This Court held that the harm of segregation was itself sufficient to entitle plaintiffs to equitable relief. *Id.* at 494. Segregation, like all discrimination, generates inferiority and lowers the status of the group which is discriminated against. *See id.*

This is no less true in the sexual harassment context. *Rabidue* and its progeny depart from the standards for harassment claims in race, religion, and national origin cases in which there is no requirement that plaintiffs demonstrate the consequences of the discrimination or satisfy a reasonableness standard.¹⁰ Consistent with this Court's decision in *Meritor*,

¹⁰ See, e.g., *Snell v. Suffolk County*, 782 F.2d 1094, 1103 (2d Cir. 1986) (race); *E.E.O.C. v. Beverage Canners, Inc.*, 897 F.2d 1067, 1070, 1072 (11th Cir. 1990) (race); *Nazaire v. Trans World Airlines*, 807 F.2d 1372, 1380 (7th Cir. 1986) (race), *cert. denied*, 481 U.S. 1039 (1987); *Vaughn v. Pool Offshore Co.*, 683 F.2d 922, 924 (5th Cir. 1982) (race);

many courts have rejected the notion that any distinction should exist between the standards for sexual and racial harassment claims.¹¹ While proof of the extent of the injury is a prerequisite to a determination of damages in discrimination cases, it is not a prerequisite to finding liability. The Sixth Circuit sexual harassment test effectively puts the cart before the horse by making plaintiffs prove the extent of their *damages* before the court *liability*. Plaintiffs who seek compensatory damages must show the extent of their injuries only to establish the amount of their damages.

2. Proof Of Serious Psychological Injury Is Unworkable

In addition, the Sixth Circuit's hostile work environment test requires plaintiffs to show that they have suffered *serious* psychological injury.¹² Proof of serious psychological injury in the

Rogers v. E.E.O.C., 454 F.2d 234, 238 (5th Cir. 1971) (race), *cert. denied*, 406 U.S. 957 (1972); *Bishena v. Marriott Corp.*, 959 F.2d 239 (9th Cir. 1992) (religion); *Daemi v. Church's Fried Chicken, Inc.*, 931 F.2d 1379, 1384 n.5 (10th Cir. 1991) (national origin); *Cariddi v. Kansas City Chiefs Football*, 568 F.2d 87, 88 (8th Cir. 1977) (national origin); *but see Davis*, 858 F.2d at 349 (race); *Turner v. Barr*, 806 F.Supp. 1025, 1027 (D.D.C. 1992) (religious harassment case citing *Davis*).

¹¹ See, e.g., *Andrews v. City of Philadelphia*, 895 F.2d at 1486, (3d Cir. 1990) (citing *Ways v. City of Lincoln*, 871 F.2d 750, 754-55 (8th Cir. 1989)); *Risinger v. Ohio Bureau of Workers' Compensation*, 883 F.2d 475, 485 (6th Cir. 1989) (reflecting equal treatment of racial and sexual harassment in § 1983 context); *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983); *Bundy v. Jackson*, 641 F.2d 934, 944-45 (D.C. Cir. 1981); *Robinson*, 760 F. Supp. at 1532. In addition, the E.E.O.C. Compliance Manual, quoted extensively by this Court in *Patterson*, provides that the principles involved with respect to harassment on the basis of race, color, religion or national origin apply with equal force to sexual harassment. E.E.O.C. Compliance Manual (CCH) § 615.7 *Harassment on the Bases of Race, Religion, and National Origin: (b) Applicable Principles and Standards*.

¹² See *Harris*, at A-19 ("[S]ome of [defendant's] inappropriate sexual comments . . . offended plaintiff However, I do not believe they were so severe as to be expected to seriously affect plaintiff's psychological well-being."); see also *Highlander v. K.F.C. Nat'l Manage-*

context of sexual harassment claims under Title VII is improper. See *United States v. Burke*, ___ U.S. ___, 112 S.Ct. 1867, 1876 (1992) (Scalia, J., concurring).

Not all women who are victims of sexual harassment suffer serious psychological harm as a result of such harassment. Nonetheless, the harassment may be so severe or pervasive that it alters the conditions of their employment and creates an abusive working environment. Those women who are able to cope with harassment should not be forced to endure it simply because they can maintain their mental health. Also, many women are forced by their economic circumstances to endure and continue working in an environment in which they are subject to sexual harassment.

Different women react differently to sexual harassment.¹³ Women employ various mechanisms to cope with sexual harassment ranging from tolerating harassing behavior and remaining quiet, to adopting the attitudes of men in the workplace in an attempt to fit in and avoid harassment, to challenging the harassment. Laurie W. LeBreton and Sara S. Loevy, *Breaking New Ground: Worksite 2000, A Report Prepared by Chicago Women in Trades* 1, 21 (1992). Because women react differently, determining liability based on the responses of the

ment Co., 805 F.2d 644, 650 (6th Cir. 1986) (citing *Rabidue*, 805 F.2d at 620) ("[T]his court must . . . consider whether the charged sexual harassment had the effect of . . . creating an intimidating, hostile, or offensive working environment that affected seriously the psychological well-being of the plaintiff.").

13 In *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), *appeal pending*, (11th Cir. argued Dec. 2, 1992) a case involving sexual harassment in non-traditional employment, K.C. Wagner, an expert witness, testified about the various coping methods of women confronted with sexual harassment, including avoiding the harassment, denying it, making some kind of joke about it, threatening to make complaints, and—the riskiest and least-used strategy—actually making complaints. Transcript of Non-Jury Trial Proceedings at 96, *Robinson v. Jacksonville Shipyards, Inc.*, Case No. 86-927-Civ.-J-12 (M.D. Fla. Jan. 26, 1989); see also Sally J. Kaplan, *Consequences of Sexual Harassment in the Workplace*, 6 *Affila* 50, 53 (Fall 1991).

victims of sexual harassment likely will lead to inconsistent and illogical results.

Further, Title VII protection attaches before victims of sexual harassment "go crazy." See *Ellison v. Brady*, 924 F.2d 872, 877-78 (9th Cir. 1991). Were this not the case, victims of sexual harassment would have to endure harassment to the point of serious mental debilitation, a proposition which lacks any support in Title VII jurisprudence.¹⁴ *Id.* at 878. It would be preposterous to assert that the plaintiff in a sexual harassment case must suffer serious psychological injury to prevail in a suit seeking equitable relief, "[t]o hold otherwise would mean that every person who brings such a suit implicitly asserts he or she is mentally unstable, obviously an untenable proposition." *Vinson v. Superior Court*, 43 Cal. 3d 833, 840, 740 P.2d 404, 409 (1987). While the mere utterance of a sexual epithet which engenders offensive feelings in an employee may not in itself constitute harassment, it is clear that an employee should not be forced to endure harassment to the point of debilitation to assert a Title VII claim. See *Rogers*, 454 F.2d at 238.

In addition, requiring sexual harassment plaintiffs to prove serious psychological injury at trial is unfair because it subjects plaintiffs who have already suffered as a result of the harassing conduct to a second victimization. See Jean A. Hamilton, Sheryle W. Alagna, Linda S. King, Camille Lloyd, *The Emotional Consequences of Gender-Based Abuse in the Workplace*:

14 See *Carrero v. New York City Housing Auth.*, 890 F.2d 569, 578 (2d Cir. 1989) ("A female employee need not subject herself to an extended period of demeaning and degrading provocation before being entitled to seek the remedies provided under Title VII."); *Burns v. McGregor Elec. Indus., Inc.*, No. 92-2059, 1993 U.S. App. LEXIS 6336 (8th Cir. Mar. 30, 1993) at *19 ("A woman does not have to endure a hostile environment in order to keep her job until she can find one elsewhere.").

Requiring a woman to remain at work and endure harassment to the point of mental breakdown is also contrary to the principle that plaintiffs have a duty to mitigate their damages. See generally *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 231 (1982) (Title VII claimant has statutory duty to minimize damages); 42 U.S.C. § 2000e-5(g).

New Counseling Programs for Sex Discrimination, in *Women, Power, and Therapy* 155 (1987). Victims of sexual harassment describe their experience of sexual harassment in terms similar to those used by rape victims: they "feel humiliated, degraded, ashamed, embarrassed, and cheap, as well as angry." Catharine A. MacKinnon, *Sexual Harassment of Working Women* 47 (1979). For example, the plaintiff in *Brooms* testified that following her subjection to racial and sexual harassment she suffered debilitating depression:

After working at Regal, I was afraid to leave my home and was unable to socialize. I was terrified that my former boss would find me and continue to assault me. I cut off all my hair to disguise myself. I began psychiatric treatment for the first time in my life in August 1984, for over a year, and I was diagnosed as traumatized, phobic and unable to work.

The Civil Rights Act of 1990: Joint Hearings on H.R. 4000 Before the House Committee on Educ. and Labor and the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 101st Cong., 2d Sess. 17 (1990). Like rape victims, most victims of sexual harassment never file complaints. Many sexual harassment victims are either too ashamed to make the harassment public and remain silent, thus devastating their self-esteem and health, or they leave their jobs without complaint, thus threatening the survival of themselves and their families. See Catharine A. MacKinnon, *Sexual Harassment: Its First Decade in Court*, in *Feminism Unmodified* 103, 114 (1987).

Proof of a plaintiff's psychological injury should only be required if the plaintiff requests damages as compensation for psychological injury; proof of psychological injury has no place in proving liability under Title VII. See *Cody v. Marriott Corp.*, 103 F.R.D. 421, 422 (D. Mass. 1984). In addition, it is not necessary that the plaintiff submit to a mental examination or provide expert testimony to prove her entitlement to damages for psychological harm. Courts routinely allow awards for

mental anguish in civil rights cases without expert testimony.¹⁵ Instead, damages are determined simply by demonstrating the nature of the conduct and its effect on the plaintiff. *Carey v. Phipps*, 435 U.S. 247, 263 & n.20 (1978).

3. The Reasonable Person Standard Is Inappropriate

The *Rabidue* trial court derived the reasonable person standard from the statement in the E.E.O.C. Guidelines that the defendant's conduct must have "the purpose or effect of *unreasonably interfering* with an individual's work performance. . . ." 29 C.F.R. § 1604.11(a)(3) (emphasis added), mistakenly concluding that the word "unreasonably" opens the door to consideration of a host of factors about the plaintiff and the work environment.¹⁶ *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). The ease with which other courts uncritically adopted the language of "reasonableness"¹⁷ likely was inspired by the familiar use of "rea-

15 See, e.g., *Carrero v. New York City Housing Auth.*, 890 F.2d 569, 581 (2d Cir. 1989) (sexual harassment plaintiff's testimony about her feelings, corroborated by testimony of co-workers who saw her crying, supports pain and suffering award); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1425 (7th Cir. 1986) (award to racial harassment plaintiff supported by testimony of plaintiff and his wife that plaintiff was harmed); *Chalmers v. City of Los Angeles*, 762 F.2d 753, 760-61 (9th Cir. 1985) (plaintiff's testimony about her feelings supported damage award), *aff'd*, 834 F.2d 697 (8th Cir. 1987); *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1238 (D.C. Cir. 1984) (racial harassment plaintiff entitled to damages based solely on her testimony).

16 In contrast, the unreasonable interference standard in the E.E.O.C. Guidelines does not focus on the reasonableness of the plaintiff, but on whether the defendant's conduct created an unreasonable degree of interference with the plaintiff's work.

17 A number of circuits use some form of reasonableness standard in Title VII sexual harassment cases. See, e.g., *Burns*, No. 92-2059, 1993 U.S. App. LEXIS 6336 at *5 n.3 ("[T]he appropriate standard is that of a reasonable woman under similar circumstances."); *Ellison*, 924 F.2d at 879 (9th Cir. 1991) ("conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and

sonableness" as a standard in tort law. However, the reasonable person standard in tort law is not applied to the plaintiff's behavior, but to the *defendant's*. Courts have inappropriately injected the reasonable person standard into sexual harassment cases by focusing on the reasonableness of the plaintiff's perception of and response to the defendant's conduct, rather than on the conduct itself. The focus of the court's inquiry should be directed to the defendant's conduct; the reasonableness of any particular plaintiff's reaction to that conduct is irrelevant. "If defendant's conduct was sufficiently extreme to violate Title VII, then plaintiff's reaction to or interpretation of that conduct is unimportant."¹⁸ *Jennings v. D.H.L. Airlines*, 101 F.R.D. 549,

create an abusive work environment"); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990) ("the discrimination would detrimentally affect a reasonable person of the same sex in that position"); *Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 192-93 (1st Cir. 1990) ("the conduct was not of the type that would interfere with a reasonable person's work performance, nor would it seriously affect a reasonable person's psychological well-being. . . ."); *Yates v. Avco*, 819 F.2d 630, 637 (6th Cir. 1987) ("person standing in the shoes of the employee should be 'the reasonable woman'"); *Brooms v. Regal Tube Co.*, 881 F.2d 412, 419 (7th Cir. 1989) (consider "the likely effect of a defendant's conduct upon a reasonable person's ability to perform his or her work"); *Waltman v. International Paper Co.*, 875 F.2d 468, 476 (5th Cir. 1989) (citing *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988)) (referencing 5th Circuit decision stating "any reasonable person would have to regard these cartoons as highly offensive . . .").

18 Plaintiffs in hostile environment race harassment lawsuits generally are not required to show that their response to the harassment was reasonable. *See, e.g., Rogers v. E.E.O.C.*, 454 F.2d 234, 238 (5th Cir. 1971) (Title VII violation established upon showing that employer created work environment "heavily charged with ethnic or racial discrimination"), *cert. denied*, 406 U.S. 957 (1972); *Accord Nazaire v. Trans World Airlines*, 807 F.2d 1372, 1380 (7th Cir. 1986), *cert. denied*, 481 U.S. 1039 (1987); *Snell v. Suffolk County*, 782 F.2d 1094, 1103 (2d Cir. 1986); *Gilbert v. City of Little Rock*, 722 F.2d 1390, 1394 (8th Cir. 1983); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1358 (11th Cir. 1982); *Vaughn v. Pool Offshore Co.*, 683 F.2d 922, 924 (5th Cir. 1982). To the extent that courts have employed a reasonable person standard in race cases, it is as a result of their uncritical application of the Sixth Circuit's reasonable-

551 (N.D. Ill. 1984); *see also* Note, *Sexual Harassment Claims of Abusive Environment Under Title VII*, 97 Harv. L. Rev. 1449, 1463 (1984).

The *Rabidue* "reasonable person" standard in sexual harassment cases forces plaintiffs to prove that discrimination at work is worse than discrimination in society. For example, because sexually explicit material is prevalent in society, the *Rabidue* court concluded that the display of sexually explicit posters in the workplace would not detrimentally affect a reasonable individual. *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 622 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). In support of its finding that the plaintiff's response to the harassment was unreasonable, the *Rabidue* court noted the "lexicon of obscenity that pervaded the environment of the workplace" and the "reasonable expectation of the plaintiff upon voluntarily entering that environment" that she would encounter such abuse. *Id.* at 620. Conduct that is prevalent in society may be abusive in the workplace, denying employees their Title VII right to be treated equally. *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1561 n.3 (11th Cir. 1987) (the "whole point" of a sexual harassment claim is often that conduct permissible in a social setting is inappropriate when carried out in the workplace). Thus, by adverting to the prevalence of discrimination in society, the *Rabidue* court accepted discriminatory behavior in the workplace and penalized the plaintiff for entering a workplace pervaded with discriminatory conduct. The *Rabidue* court thereby vitiated Title VII's objective of *changing the workplace*.¹⁹

ness inquiry that was first enunciated in *Rabidue*. *See, e.g., Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1510 (11th Cir. 1989) (adopting, without discussion, reasonable person standard in *Davis*).

19 As Judge Keith poignantly noted in his dissent in *Rabidue*, what society condones is irrelevant, especially when one considers that society at one point also condoned slavery. *Rabidue*, 805 F.2d at 627 (Keith, J., dissenting on plaintiff's substantive claims and concurring on issue of successor liability); *see also* Guido Calabresi, *Ideals, Beliefs, Attitudes, and the Law: Private Law Perspectives on a Public Law Problem* 28 (1985) (discussing danger that reasonableness standard might exclude viewpoints of powerless groups).

While Congress did not expect Title VII to eliminate all private prejudice overnight, it enacted Title VII to "alter the dynamics of the workplace, . . . operat[ing] to prevent bigots from harassing their co-workers." *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 350 (6th Cir. 1988) (explaining *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987)), *cert. denied*, 490 U.S. 1110 (1989); see also *DeGrace v. Rumsfeld*, 614 F.2d 796, 805 (1st Cir. 1980) (an employer cannot change employee's personal beliefs, but can let it be known that racial harassment will not be tolerated and take reasonable measures to enforce this policy).²⁰ Thus, although the appropriate Title VII inquiry is whether the conduct was discriminatory because it diminished the plaintiff's status in the workplace and hindered equal employment opportunity, *Rabidue* instead focused on whether the defendant's conduct violated societal norms.²¹ See Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 Yale L.J. 1177, 1205 (1990).

²⁰ In other contexts, this Court has held that discrimination cannot be justified by the prevalence of private prejudice. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect").

²¹ In other cases in which defendants sought to defend discrimination as simply a reflection of societal norms, courts rejected the *Rabidue* analysis. See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1525-27 (M.D. Fla. 1991) (rejecting the social context argument espoused in *Rabidue*, and noting that this analysis "violates the basic tenet of the hostile work environment cause of action, the necessity of examining the totality of the circumstances"), *appeal pending*, (11th Cir. argued Dec. 2, 1992). See also *Walker*, 684 F.2d at 1359 & n.2 (11th Cir. 1982) (the social milieu does not diminish the impact of racial slurs); *Sparks*, 830 F.2d at 1561 n.13 ("[behavior that] may be permissible in some settings . . . can be abusive in the workplace . . ."); *Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271, 1275 n.11 (5th Cir. 1989) (the "heavy pollution defense" is inconsistent with *Vinson* and *Henson*). See generally Catharine A. MacKinnon, *Sexual Harassment: Its First Decade In Court*, in *Feminism Unmodified* 115 (1987) ("If the pervasiveness of an abuse makes it nonactionable, no inequality sufficiently institutionalized to merit a law against it would be actionable.").

Since *Rabidue*, the Sixth Circuit has altered its restrictive reasonableness standard by comparing the plaintiff to a reasonable woman rather than to a reasonable person. *Yates v. Avco*, 819 F.2d 630, 637 (6th Cir. 1987) ("person standing in the shoes of the employee should be 'the reasonable woman'"). However, modifying the reasonable person test to a reasonable woman test does not adequately rehabilitate it. The reasonable woman standard still focuses the inquiry on the plaintiff's reactions rather than on the defendant's conduct and engages the court in making value judgments as to which responses by women are reasonable and which are not.²² See *Rabidue*, 805 F.2d at 627 (Keith, J., dissenting on plaintiffs substantive claim and concurring on issue of successor liability).

Requiring a sexual harassment plaintiff to satisfy a reasonable woman standard lays the foundation for improper and abusive inquiries about the plaintiff, such as looking to her past sexual history, including sexual abuse or rape, on the grounds that such an examination could uncover whether she is hysterical or oversensitive, and thus not reasonable. See *Carter v. Social Sec. Admin.*, 856 F.2d 202 (Fed. Cir. 1988) (available in No. 88-3088 (Fed. Cir. Aug. 29, 1988) (WESTLAW, Allfeds File)) at *2 (Nies, J., dissenting) (evidence that sexual harassment claimant had "a vindictive personality" relevant to whether she "unreasonably ma[d]e more of the [petitioner's stroking her buttocks with his hand] than a reasonable person would attribute to it"). Some courts have recognized that in sexual harassment cases, as in rape cases, inquiry into past sexual history is impermissible because it subjects victims of sexual harassment to a second victimization on the witness stand.²³

²² In tort law "perpetrators are required to take victims as they find them, so long as they are not supposed to be doing what they are doing." Catharine A. MacKinnon, *Sexual Harassment: Its First Decade In Court*, in *Feminism Unmodified* 108 (1987).

²³ See, e.g., *Priest v. Rotary*, 98 F.R.D. 755, 762 (N.D. Cal. 1983) (deposition inquiry into past sexual history of sexual harassment plaintiff, like rape victim, is more "harassing and intimidating" than probative); *Vinson v. Superior Court*, 43 Cal. 3d 833, 843, 740 P.2d 404, 411

The possibility that tactics such as [inquiry into plaintiff's sexual history] might intimidate, inhibit, or discourage Title VII plaintiffs . . . would clearly contravene the remedial effect intended by Congress in enacting Title VII, and should not be tolerated by the federal courts. . . . Sexual harassment plaintiffs would appear to require particular protection from this sort of intimidation and discouragement if the statutory cause of action for such claims is to have meaning. Without such protection from the courts, employees whose intimate lives are unjustifiably and offensively intruded upon in the workplace might face the "Catch-22" of invoking their statutory remedy only at the risk of enduring further intrusions into irrelevant details of their personal lives in discovery, and, presumably, in open court.

Priest, 98 F.R.D. at 761. Plaintiffs with valid sexual harassment claims most certainly would be discouraged from pursuing those claims because they justifiably fear that filing a sexual harassment lawsuit would occasion highly intrusive exploration into the details of their private lives. *Id.*; *Robinson v. Jacksonville Shipyards, Inc.*, 118 F.R.D. 525, 531 (M.D. Fla. 1988).

The decisions in *Rabidue* and *Harris* demonstrate the manner in which the reasonableness inquiry can be used to penalize sexual harassment victims. In *Rabidue*, the description of Vivienne Rabidue as "independent, ambitious, aggressive, intractable and opinionated" and as having "an abrasive, rude,

(1987) (plaintiff's sexual history and practices not relevant to claim for emotional distress). The concept of double-victimization has often been recognized in the context of rape prosecutions. See, e.g., *Mary M. v. City of Los Angeles*, 54 Cal. 3d 202, 222, 814 P.2d 1341, 1353 (1991) (recognizing that "victims of rape were often victimized a second time" during trial, California enacted a "rape shield law" which limits the admissibility of evidence of a complainant's sexual history); *People v. Griffen*, 138 Misc. 2d 279, 282, 524 N.Y.S.2d 153, 155 (Sup. Ct. Kings County 1988) (New York enacted a "rape shield law" which limits the admissibility of evidence of the victim's sexual conduct to "bar harassment of victims with respect to irrelevant issues").

antagonistic, extremely willful, uncooperative, and irascible personality," *Rabidue*, 805 F.2d at 615, effectively removed her from the class of reasonable women and permitted the court to ignore the conduct to which she was subject—including being referred to as " 'fat ass,' " and being one of a group of women employees who was referred to as " 'whores,' " " 'cunt,' " " 'pussy,' " and " 'tits.' " ²⁴ *Rabidue*, 805 F.2d at 624 (Keith, J., dissenting on plaintiffs substantive claim and concurring on issue of successor liability) (citing *Rabidue v. Osceola Ref. Corp.*, 584 F. Supp. 419, 423 (E.D. Mich. 1984)). Likewise, in *Harris v. Forklift Systems, Inc.*, the magistrate judge evaluated plaintiff's hostile environment claim in light of the fact that she was a "managerial employee" who "cursed and joked and appeared to her co-workers to fit in quite well." ²⁵ *Harris*, at A-18-19. Reasonableness, whether couched in the language of a

24 Professor Nancy Ehrenreich comments that the dissenting judge in *Rabidue* viewed the reasonable woman test as distinguishing between unprotected "neurotic" women and protected "reasonable" women. *Pluralist Myths*, 99 Yale L.J. at 1217. If discrimination occurred, the fact that an individual plaintiff is "neurotic," or not "possessed of a pleasing personality," *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894, 941-42 (D.N.J. 1978), *vacated in part on other grounds*, 473 F. Supp. 786 (D.N.J. 1981), should not prevent that individual from making out a claim of discrimination. Moreover, if discrimination occurred and harmed an individual who was uniquely vulnerable to harm, that individual is entitled to obtain whatever recompense for the resulting harm that is available under prevailing law. See *Valdez v. Church's Fried Chicken*, 683 F. Supp. 596, 611-17 (W.D. Tex. 1988).

25 Inquiry into the plaintiff's character should not be used to waive her legal protection against harassment. See *Swentek v. USAir, Inc.*, 830 F.2d 552, 557 (4th Cir. 1987) ("Plaintiff's use of foul language or sexual innuendo in a consensual setting does not waive 'her legal protections against unwelcome harassment.' "); *Katz v. Dole*, 708 F.2d 251, 254 n.3 (4th Cir. 1983) ("A person's private and consensual sexual activities do not constitute a waiver of his or her legal protections against unwelcome and unsolicited sexual harassment."); *Burns v. McGregor Elec. Indus., Inc.*, No. 92-2059, 1993 U.S. App. LEXIS 6336 at *9 (8th Cir. Mar. 30, 1993) (the plaintiff's "private life, regardless how reprehensible the trier of fact might find it to be, did not provide lawful acquiescence to unwanted sexual advances at her work place by her employer").

reasonable person or a reasonable woman, operates as a vehicle for the introduction of sex stereotyping, diverts the otherwise straightforward Title VII inquiry into the defendant's conduct, and devolves into an inquiry about the character of the victim in light of societal norms.

POINT II

THIS COURT SHOULD REAFFIRM MERITOR BY USING A CONDUCT-BASED TEST FOR ASSESSING LIABILITY FOR SEXUAL HARASSMENT UNDER TITLE VII

A. The Conduct-Based Test

This Court should reaffirm the *Meritor* test for assessing liability for hostile work environment sexual harassment under Title VII which focuses on the defendant's conduct rather than on the plaintiff. This Court should reject any requirement that the plaintiff prove serious psychological injury to establish hostile work environment liability.²⁶ As stated by this Court in *Meritor*, the test for hostile work environment liability is broad and flexible. Unwelcome sex-based conduct is unlawful dis-

²⁶ Harassing conduct need not be directed solely at the plaintiff for Title VII liability to attach. Courts have held that Title VII liability applies when the work environment as a whole is hostile to people in the same protected class as the plaintiff. See, e.g., *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987) (woman who has never herself been the object of sexual harassment might have Title VII claim if she were forced to work in atmosphere where such harassment was pervasive); *Rogers v. E.E.O.C.*, 454 F.2d 234, 239 (5th Cir. 1971) (unlawful employment practice could be based on discriminatory behavior toward clients of employer, and not employee, since employee could suffer "the consequences of such a practice"), cert. denied, 406 U.S. 957 (1972); see also *Daemi v. Church's Fried Chicken, Inc.*, 931 F.2d 1379, 1385 (10th Cir. 1991) (Title VII liability attaches on claim of harassment based on race and national origin where work environment was hostile to all Iranians and blacks).

crimination when the plaintiff establishes proof which satisfies any one of the following formulations of the test: (1) The conduct is sufficiently severe or pervasive as to alter the conditions of the victim's employment, or (2) the conduct has the purpose or effect of (a) creating a hostile, offensive or abusive working environment, or (b) unreasonably interfering with the victim's work performance. Satisfaction of any one of these three standards would satisfy the requisite standard of proof. Each one of these standards vindicates Title VII's goal of affording employees the right to work in an environment free from discriminatory intimidation, ridicule and insult. See *Meritor*, 477 U.S. at 65-67 (1986) (citing the various hostile work environment standards with approval). See also *Ellison v. Brady*, 924 F.2d 872, 877 (9th Cir. 1991) (the various standards cited in *Meritor* are not inconsistent). This analysis is to be determined under a totality of the circumstances. *Id.* at 69.

A conduct-based test will not significantly alter the number of viable claims for sexual harassment under Title VII. The plaintiff must, of course, also prove that she is a member of the protected group, that the alleged discriminatory conduct was unwelcome and sex-based, and that the defendant was legally responsible. A solitary incident of harassment will not be actionable unless it is sufficiently severe. See *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503 (11th Cir. 1989). The determination of whether the defendant's conduct is actionable is a question of fact to be decided by a trier of fact.²⁷ The goals

²⁷ The trier of fact may be a judge (where equitable relief only is sought or jury demand waived) or jury. 42 U.S.C. § 1981a(c) (amending Title VII to provide right to jury trial). Whether certain conduct constitutes sexual harassment is precisely the type of factual determination which judges and juries make every day. In fact, our legal system is based on the premise that juries are not only capable of making these types of factual determinations, but that they are the preferred body to make such determinations. Even if the case is tried to a judge, there should be no prejudice to defendants. A factfinder "[w]ith access to all the evidence, and with the common sense to make credibility determinations . . . should not find it difficult to distinguish between harassing actions that constitute a violation of Title VII and those 'ambiguous'

of Title VII, as stated by Congress and interpreted by courts, should guide factfinders in determining when sexual harassment has occurred.²⁸

A conduct-based test recognizes that Title VII is meant to combat discrimination by identifying and enjoining it and by compensating for the injury caused by it.²⁹ The conduct-based test preserves both of these important functions—a liability analysis that focuses on whether defendant's conduct constituted unlawful discrimination, and a damages analysis that focuses on the impact of that conduct on the plaintiff. Unlike the psychological injury test, the conduct-based test does not penalize plaintiffs by forcing them to prove both actionable harassment *and* the extent of their injury as a consequence of

actions which simply may not 'create an abusive working environment.' " *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1561 n.13 (11th Cir. 1987) (citation omitted).

28 See *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990) (Title VII prevents "the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women"); *Henson v. City of Dundee*, 682 F.2d 897, 901 (11th Cir. 1982) ("Title VII prohibits employment discrimination on the basis of gender, and seeks to remove arbitrary barriers to sexual equality at the workplace") (citations omitted); *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 326 (N.D. Cal. 1992) (Title VII's purpose is to "promote gender-equal opportunity in the work force").

29 In 1991, Congress specifically recognized that Title VII should also address the harms suffered by individual victims of sexual harassment by expanding the remedies available to individual sexual harassment victims. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 2000e-2). Harms to individual victims of sexual harassment include depression, headaches, sleeplessness, anxiety, nausea, mental anguish, humiliation, and reduced self-esteem. See, e.g., *Vinson v. Superior Court*, 43 Cal. 3d 833, 837, 740 P.2d 404, 409 (1987); *Brooms v. Regal Tube Co.*, 881 F.2d 412, 417 (7th Cir. 1989). See also Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 Cal. L. Rev. 775, 783 (1991); Peggy Crull, Ph.D., *Stress Effects of Sexual Harassment on the Job: Implications for Counseling*, 52 Amer. J. Orthopsychiatry 539, 541 (1982).

the harassment in order to establish liability. Liability is established upon a court's determination that the defendant's conduct constituted sexual harassment. The determination of whether a defendant's conduct rises to the level of actionable harassment should be made with reference to the defendant's conduct, the hostile nature of such conduct in the workplace, and the goals of Title VII. This is consonant with the Title VII principle that discrimination is a harm in itself.

In addition, plaintiffs may seek equitable relief, recover compensatory damages based on a showing of the nature and extent of the injury, and punitive damages upon a showing of egregiousness on the part of the defendant. While demonstrating the extent of injuries may be appropriate to prove damages, the *Meritor* Court correctly omitted any requirement that plaintiffs show the extent of their injury as a consequence of the harassment to establish liability for sexual harassment under Title VII. "Though it is quite possible for a victim of race- or sex-based employment discrimination to suffer psychological harm, her entitlement to [backpay] under Title VII does not depend on such a showing." *United States v. Burke*, ___ U.S. ___, 112 S. Ct. 1867, 1876 (1992) (Scalia, J., concurring).

B. How *Harris* Would Have Been Analyzed Using A Conduct-Based Test

Were the *Harris* case to have been analyzed using the conduct-based test, instead of the more stringent *Rabidue* test, Teresa Harris would have prevailed in the lower courts. The fact that she did not prevail illustrates the danger of a test which requires a plaintiff to prove serious psychological injury and satisfy a reasonableness standard.

Specifically, the magistrate judge's finding that the defendant's conduct was not sufficiently severe or pervasive so as to create a hostile, abusive or offensive working environment under the totality of the circumstances is indefensible in light of the court's simultaneous finding that "[p]laintiff was the object of a continuing pattern of sex-based derogatory conduct

from [the defendant]."³⁰ *Harris*, at A-8. In fact, it is unmistakable that defendant's conduct was both derogatory and continuous and sufficiently severe and pervasive to create a hostile, abusive or offensive working environment. As the magistrate judge noted: (1) defendant would ask female employees to retrieve coins from his front pants pocket; (2) defendant stated to the plaintiff in the presence of other employees " 'You're a woman, what do you know,' " " 'You're a dumb ass woman,' " and " 'Let's go to the Holiday Inn to negotiate your raise,' " *id.* at A-9 (citations omitted); and (3) defendant continued to harass plaintiff even after she complained to him about his behavior towards her, *id.* at A-10.

Further, the magistrate judge found that "some of [defendant's] inappropriate sexual comments, . . . offended plaintiff, and would offend the reasonable woman. However, . . . they were not so severe as to be expected to seriously affect plaintiff's psychological well-being." *Id.* at A-19. This court's unwarranted use of the standards of reasonableness and serious psychological injury allowed it to dismiss plaintiff's Title VII claims even when the factual circumstances clearly indicate that she was subject to sexual harassment.

This Court has never held that harassing conduct must be so severe as to seriously affect the mental health of plaintiffs or that plaintiffs must withstand a reasonableness inquiry to establish liability under Title VII. Title VII would be crippled by such requirements. Title VII's mandate of providing women equality in the workplace is manifestly disserved when a court dismisses a case in which the plaintiff proves that she was sub-

³⁰ The magistrate judge found that Harris satisfied the other four elements of its test: "Teresa Harris is a woman, and thus a member of a protected class; there is no proof that male employees of Forklift were subjected to the conduct complained of by plaintiff; and Charles Hardy, the party allegedly responsible for committing the sexual harassment, is President of the company" *Harris*, at A-17. Teresa Harris also established that the conduct was unwelcome because she complained to the defendant about his sexually crude comments. *Id.* at A-10.

ject to unwelcome and continuous derogatory conduct based on her sex, and that a reasonable woman would have been offended by such conduct. Accordingly, this Court should overturn the Sixth Circuit's test and return sexual harassment law to its proper place in Title VII jurisprudence.

CONCLUSION

For these reasons, Amici Curiae respectfully request this Court to reverse the Sixth Circuit's decision in *Harris* and reestablish the standards for proof of hostile work environment set out in *Meritor*.

Respectfully Submitted,

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APPENDIX

APPENDIX

STATEMENTS OF INTEREST

Interest Of Amicus Curiae
NOW Legal Defense And Education Fund

NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women economic opportunities, such as sexual harassment. In furtherance of that goal, NOW LDEF litigates cases to secure full enforcement of laws prohibiting sexual harassment, including *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), *appeal pending*, (11th Cir. argued Dec. 2, 1992), and *Townsend v. Indiana University*, No. 92-2869 (7th Cir. argued April 6, 1993).

Interest Of Amicus Curiae Catharine A. MacKinnon

Catharine A. MacKinnon, Professor of Law at the University of Michigan, is an authority on sex equality who pioneered the legal claim for sexual harassment as sex discrimination, as reflected in her *Sexual Harassment of Working Women* (1979). She was co-counsel to Mechelle Vinson in the Supreme Court in *Meritor Savings Bank v. Vinson* and consults extensively on legislation, litigation (including *Robinson v. Jacksonville Shipyards*), administration, policy, and counseling issues in the sexual harassment area.

Interest Of Amicus Curiae The American Jewish Committee

The American Jewish Committee ("AJC") is a national civic organization of approximately 50,000 members which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. AJC has always believed that this goal can best be accomplished by helping to preserve and promote

the constitutional rights of all Americans. Specifically, AJC strongly supports full and equal rights for women and is committed to the elimination of all gender-based discrimination, regardless of the form in which it may appear. Sexual harassment of women is a flagrant and intolerable form of such discrimination.

Interest Of Amicus Curiae
American Medical Women's Association, Inc.

Amicus American Medical Women's Association, Inc. ("AMWA") is a nonprofit organization of 13,000 women physicians and medical students, founded in 1915 and representing women in all specialties of medicine and diverse career roles. One of AMWA's primary missions is to promote career development for women in medicine. AMWA strongly opposes sexual harassment and other forms of gender discrimination which interfere with an individual's ability to work effectively within her/his profession.

Interest Of Amicus Curiae
Asian American Legal Defense And Education Fund

Founded in 1974, the Asian American Legal Defense and Education Fund ("AALDEF") is a civil rights organization that addresses critical problems in the Asian American community through litigation, advocacy, and community education. Its current program priorities include voting rights, immigrant rights, labor and employment rights. AALDEF represents victims of anti-Asian violence and seeks redress for Japanese Americans who were interred in U.S. camps during World War II. Asian Americans, as victims of sexual harassment, endure the harmful consequences of abusive conduct.

Interest Of Amicus Curiae
Association For Union Democracy

The Association For Union Democracy ("AUD") is a non-profit corporation founded in 1969 which seeks to further democratic principles and practices in American labor orga-

nizations, both by encouraging union members to participate actively in the internal life of their unions, and by protecting the exercise of their democratic rights within their unions. No other organization devotes itself primarily to this objective. The AUD Women's Project, created in 1985, helps women union members working for sexual equality on the job and in their unions. Since 1985, the Project has advised hundreds of women subjected to sexual discrimination and harassment at work. The Association's experience leads it to conclude that hostile working environments in the form of verbal abuse, physical abuse and displays of pornographic material contribute to discrimination against women in the workplace.

Interest Of Amicus Curiae
The Center For Women Policy Studies

The Center for Women Policy Studies was founded in 1972 as the first national policy research and advocacy institute focused exclusively on issues of social and economic justice for women. The Center conducts research and advocacy programs on sexual harassment and violence against women, work/family and "diversity" policies of employers, education, and other relevant issues.

Interest Of Amicus Curiae Chicago Women In Trades

Chicago Women in Trades ("CWIT") is an organization that assists and advocates for tradeswomen and women seeking entry into blue-collar nontraditional employment. CWIT hosts monthly support meetings, provides training to women interested in the trades, works to increase the number of women in the trades, and advocates for equal employment opportunities. CWIT is concerned with the legal standards for proving sexual harassment because sexual harassment is a pervasive problem for many tradeswomen.

Interest Of Amicus Curiae
The Illinois Coalition Against Sexual Assault

The Illinois Coalition Against Sexual Assault is a private, non-profit, tax-exempt coalition of member centers which pro-

vide services to adult survivors of rape, incest and childhood sexual abuse, assault victims and sexual harassment victims throughout Illinois. Member centers see sexual harassment victims who are suffering from many of the same traumas that rape victims suffer. The injury will be compounded if, before establishing an actionable case, the victim must suffer severe psychological injury. By eliminating review of the character and coping mechanisms of individual plaintiffs, the court can focus on the nature of the act as harmful to all employees. The burden will then be rightfully placed on those who act discriminatorily rather than on those who struggle to deal with a discriminatory workplace.

*Interest of Amicus Curiae
National Organization for Women, Inc.*

The National Organization for Women ("NOW") is the nation's largest feminist organization devoted to the advancement of women's rights, with over 280,000 members and more than 700 chapters in all 50 states and the District of Columbia. NOW has, since its inception, supported and worked toward full equal employment opportunity for women, including the elimination of sexual harassment and other sex discrimination in the workplace.

Interest Of Amicus Curiae National Tradeswomen's Network

The National Tradeswomen's Network ("NTN"), founded in 1989, is a network of organizations committed to significantly increasing the numbers and diversity of women entering and working in non-traditional blue collar occupations. NTN represents tens of thousands of women across the United States. Sexual harassment is a major barrier facing tradeswomen. According to a recent survey by Chicago Women in Trades, tradeswomen report that on the job site: 88 percent have encountered pictures of naked or partially dressed women; 83 percent have received unwelcome sexual remarks; and 57 percent reported being touched or asked for sex. Women entering traditionally male workplaces should not have to tolerate sex-

ual harassment in any form. As working women, we demand respect and dignity in our lives as workers.

*Interest Of Amicus Curiae
Northern New England Tradeswomen Inc.*

Northern New England Tradeswomen ("NNETW") is a non-profit membership organization founded in 1987, for tradeswomen and friends in Vermont, New Hampshire, New York, Massachusetts, Maine and Quebec. NNETW serves over 1000 people and its goal is to increase the opportunities for women to enter and remain in the trades through networking, advocacy, training and sharing resources. Women in the trades encounter intense sexual harassment, often in the form of a hostile work environment. NNETW believes that it is time to stop expecting women to "deal with" harassment or get out of the trades; it is time to make the workplace less hostile.

*Interest Of Amicus Curiae
Puerto Rican Legal Defense and Education Fund*

The Puerto Rican Legal Defense and Education Fund ("PRLDEF") is a national civil rights organization founded in 1972 to protect the civil rights of Puerto Ricans and other Latinos, and to ensure their equal protection under the law. PRLDEF opposes all forms of discrimination based on race, religion, sex, sexual orientation, national origin and disability. Sexual harassment is an all too prevalent problem facing Latina workers. PRLDEF believes that sexual harassment should not be subject to a higher standard of proof than other forms of discrimination.

Interest Of Amicus Curiae Women's Law Project

The Women's Law Project ("WLP") is a non-profit, feminist legal advocacy organization, located in Philadelphia. Founded in 1974, WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public education, and individual counseling. During the nineteen years of its existence, WLP's

activities have included extensive work in the area of sex discrimination in employment. WLP has a strong interest in the eradication of sexual harassment and other forms of discrimination against women in the workplace and the availability of strong and effective remedies under Title VII of the Civil Rights Act of 1964, as amended.

No. 92-1168

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

TERESA HARRIS,

Petitioner,

—v.—

FORKLIFT SYSTEMS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**BRIEF AMICUS CURIAE OF
THE AMERICAN CIVIL LIBERTIES UNION
AND THE AMERICAN JEWISH CONGRESS
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI*¹

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has repeatedly supported the free speech right to express even "offensive" thoughts. The ACLU has also steadfastly defended the right of women to be free from discriminatory treatment in the workplace and elsewhere.

This case touches upon both of these concerns. Specifically, it requires the Court to consider the relationship between free speech principles and the concept of a "hostile working environment" under Title VII. It also requires the Court to clarify the standards for determining liability when a Title VII claim rests, in whole or in part, on allegations of verbal harassment. Because these issues have a direct bearing on the work of the ACLU, we respectfully submit this brief *amicus curiae* to assist the Court in its deliberations.

The American Jewish Congress is a membership organization of American Jews founded in 1918, which seeks to protect the religious, political and economic rights of Jews, and to promote civil rights and liberties for all Americans. It is particularly committed to the principle of sexual equality. It believes that all workers are entitled to an employment environment which is not hostile or abusive and which permits them to realize their fullest potential on the job.

¹ Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

STATEMENT OF THE CASE

Teresa Harris was employed as a rental manager by Forklift Systems, Inc., a Tennessee corporation, from April 22, 1985 to October 1, 1987. At the time, she was one of six managers employed by respondent; four were male, the one other female manager was the daughter of the company's president, Charles Hardy.

During the approximately eighteen months petitioner worked for Forklift, she was subject to what the Magistrate described as "a continuing pattern of sex-based derogatory conduct from Hardy." Pet.App. at A13. According to the Magistrate's findings, Hardy asked petitioner (and other female employees) to retrieve coins from his front pants pocket. *Id.* at A14. He also threw various objects on the ground and then made remarks about petitioner's clothing when she stooped to pick them up at his direction. *Id.* at A14-A15.²

In addition, the Magistrate found that Hardy made a number of discriminatory comments directed at petitioner in front of other employees. These comments fit into two general categories. Some cast doubt on petitioner's ability because she is female. For example: "You're a woman, what do you know"; "You're a dumb ass woman"; and "We need a man as the rental manager." Other comments were overtly sexual. For example: "Let's go to the Holiday Inn to negotiate your raise." *Id.* at A13-A15.³

On August 18, 1987, petitioner met with Hardy to complain about his comments and behavior. Hardy apologized (although professing surprise that petitioner

² It is not clear from the Magistrate's Report how frequently these incidents occurred.

³ The Magistrate found that petitioner treated this last comment as a joke. *Id.* at A14. He did not make a similar finding with regard to any of Hardy's other remarks.

had been offended) and promised to reform. This promise was not kept. Within a month, Hardy asked petitioner -- again in front of other employees -- whether she had secured an account by promising sexual favors to the customer. *Id.* at A16-A17.

On October 5, 1987, petitioner filed a discrimination complaint with the EEOC. Two days later, Hardy terminated his business relationship with petitioner's husband, who had been a supplier for Forklift. *Id.* at A20. Hardy also amended petitioner's personnel record after she filed her EEOC complaint "in order," the Magistrate found, "to manufacture a justification for her termination." *Id.* at A19.

Based on these findings, the Magistrate "discount[ed]" respondent's "theory of th[e] case," which was that petitioner had quit because the business relationship between her husband and Forklift had deteriorated. *Id.* at A24. The Magistrate nevertheless ruled that petitioner had failed to establish that she was the victim of sexual harassment under Title VII.⁴

Citing *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987), the Magistrate held that a sexual harassment claim could only be sustained upon proof of "conduct which would interfere with that hypothetical reasonable individual's work performance and affect seriously the psychological well-being of that reasonable person under like circumstances." Pet.App. at A28-A29. He then concluded that Hardy's comments, while "inappropriate," were not "so severe as to be expected to seriously affect [petitioner's]

⁴ Under Title VII, it is an "unlawful employment practice" for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a).

workplace to be a hostile environment, the plaintiffs could not have been affected because both "were married women with years of waitressing experience who were quite able to take care of themselves"), *aff'd*, 944 F.2d 905 (6th Cir. 1991). Requiring the fact-finder to evaluate whether a plaintiff suffered psychological injury simply increases the likelihood that the employer will seek to introduce evidence of the victim's prior experience. Indeed, short as it is, respondent's opposition to certiorari in this case itself reflects this practice, characterizing petitioner as "a *four-time married white female*". Br. Opp. 1 (emphasis added).

The increased likelihood that a victim's entire personal life would be put on trial simply because she wants to stop sexual harassment could well discourage women from vindicating their rights under Title VII. Worse, it could send a message to employers and coworkers that any woman who had not lived a "saintly" life would be fair game for offensive and discriminatory harassment.

A psychological injury requirement is also problematic because courts may unduly rely on potentially misleading evidence in evaluating the nature and extent of injury. To rebut a claim that a plaintiff suffered psychological injury, an employer may argue that a plaintiff who did not exhibit visible distress could not have suffered psychological injury. Studies suggest, however, that the plaintiff's contemporaneous, visible reaction to the conduct may not accurately reflect the effect on her.¹⁴

¹⁴ A survey of ten studies of sexual harassment found that a median of 41% of harassment victims used various avoidance techniques, such as avoiding or ignoring the harassment, and an additional 24% sought to defuse the situation through means such as joking or stalling. Twenty-three percent used some form of negotiation, such as asking the harasser to stop, while only 10% used confrontation, such as telling the harasser to stop, making a formal complaint, or hitting the harasser. James Gruber, *How Women Handle Sexual Harassment: A Literature Review*, 74 *Sociol. & Social Res.* 3, 5 (1989).

Many victims of sexual harassment cannot afford—financially—to complain openly about the conduct they find offensive. *See, e.g.*, USMSPB at D-27 (89% of female harassment victims reported that they needed their jobs quite a bit or a great deal); Estrich, *supra*, 43 *Stan. L. Rev.* at 846. A victim of harassment may legitimately fear retaliation if she complains or even if she resists or acts offended. The employer's power over the employee translates into subtle—or, in some cases, overt—economic blackmail of the victim. She can endure the harassment without complaint or risk losing her job. Under these circumstances, the victim's visible reactions on the job cannot be regarded as dispositive of whether the harassment caused "psychological injury."¹⁵

There are other reasons why a victim may be reluctant to reveal her objection to harassing conduct, particularly to the harasser or to coworkers who condone the harassment. Much hostile environment harassment is done for the purpose of demeaning, degrading or belittling the victim has been demeaned.¹⁶ In addition, if the victim coworkers. *See, e.g.*, Abrams, *supra*, 42 *Vand. L. Rev.* at 1201-02. Where the victim reveals the pain caused by the harassment, the harasser has achieved his goal—the victim has been demeaned.¹⁶ In addition, if the victim does not hide her initial reactions, she risks being branded "overly sensitive" or losing her job on the ground that she is not a "team player."

The very coping mechanisms that can help the victim to endure harassment might, by the Sixth Circuit's test, prevent her from ever forcing the employer to stop the

¹⁵ The problem identified here is not, unfortunately, unique to a psychological injury requirement. It also infects the "unwelcomeness" requirement articulated by this Court in *Meritor*.

¹⁶ A classic coping mechanism for victims of harassment is to pretend that the conduct does not bother them. *See* Gruber, *supra*; U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Government: An Update* 24 (1988).

conduct. This case illustrates the point. The magistrate found that petitioner was "not 'subjectively so offended that she suffered injury,' relying on the finding that she had 'cursed and joked and appeared to her coworkers to fit in quite well with the work environment.'" Pet. App. A-19. The magistrate apparently concluded that this evidence outweighed petitioner's testimony that she experienced "anxiety and emotional upset . . . and cried frequently" at home. *Id.* at A-10. Because petitioner apparently hid the pain she felt as a result of the employer's harassment *while she was at work*, the magistrate was unwilling to conclude that she suffered any significant pain, and therefore refused to find liability.

II. IF THE COURT CHOOSES TO SPEAK MORE BROADLY ON THE ELEMENTS OF A HOSTILE ENVIRONMENT HARASSMENT CASE, IT SHOULD CORRECT TWO ADDITIONAL LEGAL ERRORS COMMITTED BY THE COURTS BELOW.

The sole question presented in this case is whether a plaintiff alleging hostile environment sexual harassment must prove that she suffered severe psychological injury. As we demonstrated above, no such requirement does or should exist in Title VII.¹⁷ The Court need not speak further on the elements of a Title VII hostile environment case until it has before it a case in which such issues are more directly presented. However, should the Court choose to speak more broadly about the elements necessary to establish liability in such a case, it should correct several additional legal errors reflected in the decisions below.

¹⁷ The Court should therefore reverse the decisions below with respect to the hostile environment claim and direct the entry of judgment for the petitioner. The Court should also reverse the constructive discharge holding. That holding rested on the same errors of law as did the hostile environment ruling. The employer's failure to correct the hostile conduct—indeed, his escalation of it—following petitioner's complaint compelled her to resign.

A. The Courts Below Improperly Required Petitioner To Prove Both Adverse Effects On Her Work Performance And A Hostile Environment.

The courts below applied a legal standard that is based on the Sixth Circuit's erroneous rewording of standards set out in *Meritor* and the EEOC guidelines. The magistrate held that petitioner was required to prove not only that her employer created an offensive working environment, but also that the conduct interfered with her work performance. Pet. App. at A-19. Application of this dual requirement both lacks legitimate foundation and undermines the purposes of Title VII.

The magistrate applied the *Rabidue* majority's fourth element for a hostile environment claim:

the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance *and* creating an intimidating, hostile, or offensive working environment that affected seriously the psycho logical [sic] well-being of the plaintiff.

Rabidue, 805 F.2d at 619 (emphasis added). This test largely repeated the test articulated by the EEOC in its 1980 Guidelines and quoted with approval by this Court in *Meritor*:

sexual misconduct constitutes prohibited "sexual harassment," . . . where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance *or* creating an intimidating, hostile, or offensive working environment."

Meritor, 477 U.S. at 65 (quoting 29 C.F.R. § 1604.11 (a)(3)) (emphasis added). However, the Sixth Circuit not only imported the psychological injury requirement discussed above in Part I, but also inexplicably substituted the conjunctive "and" for the disjunctive "or."

By substituting "and" for "or," *Rabidue* and its progeny have doubled the burden on plaintiffs seeking to challenge hostile working environments. It is no longer enough, hold these courts, that an employee prove that her working environment was intimidating, hostile or of-

fensive. Rather, she must also prove that the conduct had the effect of "unreasonably interfering with [her] work performance." That rule is clearly wrong.¹⁸ Under the EEOC guidelines and *Meritor*, a plaintiff need prove only one or the other.¹⁹

A person who refused to allow a hostile environment to interfere with her work performance could never successfully challenge that environment under the *Rabidue* standard. *E.g.*, *Staton v. Maries County*, 868 F.2d 996 (8th Cir. 1989) (plaintiff's ability to work regular shifts for ten days following rape by her supervisor proved that the rape did not alter the conditions of her employment). Qualities such as strength, fortitude, professional pride and a healthy work ethic that should be assets in any employee would become liabilities in a Title VII case. *Cf. Stewart v. Cartessa Corp.*, 771 F. Supp. 876, 881 (S.D. Ohio 1990) (the employer should not be able to use the fact that the plaintiff is a "diligent, intelligent and productive worker" as a defense to a hostile environment claim.) The effect of such a requirement would be to force victims of hostile environment harassment to endure such harassment *until* it "unreasonably inter-

¹⁸ As we note above, hostile environment sexual harassment may well adversely affect the victim's work performance. *See supra* pp. 12-13. It does not have that effect on every victim, however, and no victim should be forced to endure harassment *until* it adversely affects her performance.

¹⁹ In addition to quoting the EEOC guidelines with approval, this Court in *Meritor* stated that conduct must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor*, 477 U.S. at 67 (quoting *Henson*, 682 F.2d at 904). The Court's quotation of *Henson's* use of the conjunctive in that context did not change the basic standard articulated in the EEOC guidelines and approved by this Court. Rather, it merely recognizes that conduct that is severe or pervasive enough to alter employment conditions would necessarily result in an abusive working environment. The EEOC guidelines make clear that a Title VII plaintiff is required only to prove either unreasonable interference with work performance or a hostile working environment.

fere[d] with [their] work performance" or to leave their jobs. Title VII imposes no such choice.

B. Application Of "Reasonableness" Standards For Determining The Severity Or Pervasiveness Of Harassing Conduct Has Legitimated Discriminatory Conduct And Reinforced Stereotypes.

To be actionable under Title VII, harassing conduct must be severe or pervasive enough to alter the "terms, conditions or privileges" of the plaintiff's employment. Under *Meritor*, an actionable hostile environment exists where conduct is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor*, 477 U.S. at 67 (citations omitted). Similarly, under the EEOC guidelines, quoted with approval by this Court, an actionable hostile environment exists where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a)(3). These formulations serve to ensure that a plaintiff will succeed in hostile environment cases only if the "terms, conditions, or privileges" of her employment were affected; an isolated epithet will not give rise to liability.

Nevertheless, the magistrate in this case followed the lead of the Sixth Circuit (and many other lower courts) by requiring petitioner to show not only that the conduct affected the "terms, conditions, or privileges" of her own employment, but that it would have affected the "terms, conditions, or privileges" of employment of some hypothetical "reasonable" person or woman. This extra burden of satisfying a "reasonableness" standard in hostile environment harassment cases has no basis in Title VII and undermines Title VII's purposes. Title VII protects individual members of groups, not a hypothetical composite plaintiff.

Nothing in the language of Title VII, *Meritor*, or the EEOC guidelines requires courts to import a "reasonableness" requirement in the case of plaintiffs alleging hostile environment harassment. Under *Meritor*, once an employee has established that she was subjected to sexual remarks or other status-based conduct that she did not welcome, that the conduct was severe or pervasive enough "to alter the conditions of [the victim's] employment and create an abusive working environment," *Meritor*, 477 U.S. at 67 (citations omitted), and that the employer is responsible for the conduct, she has established liability for a hostile work environment. The Court did not require proof that the conduct would have affected some hypothetical "reasonable person" in the same way as it affected the victim.²⁰

Experience has shown that application of a "reasonableness" criterion has served as a barrier to full realization of the right to a workplace that is free from "discriminatory intimidation, ridicule, and insult." *Meritor*, 477 U.S. at 65. It has provided courts with a yardstick that is infected with discriminatory assumptions that serve to bar legitimate claims. In the sections below, we explain some of the more significant difficulties that have arisen in connection with these "reasonableness" standards, discussing both the "reasonable person" and the "reasonable woman" standards.

²⁰ Courts may have adopted "reasonableness" standards to shield employers from "hypersensitive" employees. See, e.g., *Ellison*, 924 F.2d at 879. We suspect, however, that this threat is largely illusory. The rigors of litigation themselves present substantial deterrents to all potential plaintiffs. Moreover, the elements of a hostile environment claim provide sufficient safeguards against hypersensitive plaintiffs. If the conduct is sexual, unwelcome, and sufficiently severe or pervasive to alter the terms and conditions of employment, an employer should have no legitimate interest in perpetuating such conduct. Courts must ascribe content to the severe or pervasive criterion set forth in *Meritor* on a case-by-case basis, evaluating the conduct as it affects the victim's work environment.

1. Application of a "Reasonable Person" Standard Has Had the Effect of Perpetuating Discriminatory Conditions and Stereotypes.

A number of lower courts have held that, for conduct to be "severe or pervasive enough 'to alter the conditions of [the victims's] employment and create an abusive working environment,'" *Meritor*, 477 U.S. at 67 (citations omitted), it must have had that effect not only on the plaintiff herself, but also on a "reasonable person."²¹ On its face, this formulation sounds harmless enough. In application, however, it has the potential to perpetuate the very discriminatory conditions that Title VII was intended to eliminate. In some cases, the "reasonable person" standard has served as a powerful engine of the status quo.

One of the most disturbing examples is the majority opinion in *Rabidue*. The *Rabidue* majority held that a court must "adopt the perspective of a reasonable person's reaction to a similar environment under essentially like or similar circumstances." 805 F.2d at 620. The court refused to find Title VII liability despite evidence of highly offensive sexual conduct in the plaintiff's workplace. As grounds for condoning such conduct, the majority quoted with approval the district court's reference to the widespread existence of abusive conduct in society at large:

"Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was de-

²¹ See, e.g., *Rabidue*, 805 F.2d at 620; *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989).

signed to bring about a magical transformation in the social mores of American workers."

805 F.2d at 620-21 (quoting 584 F. Supp. at 430). The majority concluded that the prevalence of "erotica" in society at large rendered the effect of the harassing conduct on the plaintiff's work environment "de minimis." *Id.* at 622.

The "reasonable person" through whose eyes the *Rabidue* majority viewed the conduct at issue must have been the men working at Osceola Refining prior to the time Ms. Rabidue arrived. Only this formulation could account for the "factors" that the court weighed in determining the "reasonable person's reaction to a similar environment":

background and experience of [plaintiff's] coworkers, and supervisors, . . . the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment.

Id. at 620. Application of this standard grandfathered any conduct that predated the plaintiff's arrival in the workplace, presenting a highly effective barrier for any person unwilling to accept that workplace "as is."

The implications of that ruling are stark. Under *Rabidue*'s application of the "reasonable person" standard, a woman must endure truly outrageous conduct as a condition of her employment. For example, a requirement of Ms. Rabidue's job was that she meet regularly with a fellow manager who "routinely referred to women as 'whores,' 'cunt,' 'pussy,' and 'tits.'" *Id.* at 624 (Keith, J., dissenting). The *Rabidue* court's application of the "reasonable person" standard also condones widespread display in the workplace of pictorial displays that demean women.²²

²² The court's suggestion that "erotica" pervades society misses an important distinction between society as a whole and a confined

It is beyond comprehension that Congress intended that women should be required to endure such treatment in the workplace, but that is what the *Rabidue* majority found to be acceptable under a "reasonable person" standard.²³ The court's application of the standard effectively bars access to the Osceola Refining workplace by any woman who seeks to be viewed and addressed as a colleague and coworker, rather than in crude and demeaning terms involving her sexual anatomy. The company could not have excluded women from management positions any more effectively by posting a "no women managers need apply" sign at the door.

A "reasonable person" standard almost inevitably condones offensive and demeaning conduct at some level because it incorporates the views of those doing the harassing—or those who are indifferent or blind to the barriers to equal access erected by others' harassment. See, e.g., *Walker v. Ford Motor Co.*, 684 F.2d at 1359 (manager counseled black employee that racial epithets were "just something a black man would have to deal

workplace. "Girlie" magazines are not generally displayed openly on newsstands, and no one is forced to purchase them. Television has a power switch, a tuner, dozens of channels from which to choose, and decency standards. Movies have ratings for sex, violence and language. Cf. *Rabidue*, 805 F.2d at 622. The common element is free choice—one is subjected to "erotica" only if one chooses to be. The workplace is another matter altogether. If pornography is displayed in areas that an employee must frequent incident to his or her job, he or she has lost the free choice to view such material or not. A woman who must choose between viewing lewd and demeaning pictures every day and quitting her job can hardly be said to have a "free" choice.

²³ The court's suggestion that the pervasiveness of discrimination in a workplace provides grounds for refusing to find Title VII liability turns the statute on its head. When Congress enacted Title VII, it did so not because it thought that employment discrimination was the rare exception; rather, it knew that such discrimination was pervasive and sought to eradicate it. See, e.g., H.R. Rep. No. 914, reprinted in 1964 U.S.C.C.A.N. 2355, 2401.

with in the South"). After all, the perpetrators of much conduct that courts have characterized as harassment presumably think their conduct is perfectly reasonable. But if the harasser's conduct erects a barrier to equal access to the workplace, his viewpoint—or that of others like him—about the reasonableness of the conduct or the environment it creates should be irrelevant.

Finally, courts may wrongly assume that it is appropriate to include within the universe of "reasonable persons" members of protected groups who appear to have been, like many of the female clerical employees at Forklift Systems, "conditioned to accept denigrating treatment." Pet. App. at A-18. Some of these employees may have endured denigrating treatment in silence because of fears of retribution. Such conditioning or silent endurance must not set the standard for what constitutes actionable harassment. Title VII cannot be limited by the acquiescence of some—or even of all but one—to barriers to equal access.

Even if the fact-finder believes that he or she is viewing the conduct at issue objectively, that view may well be a product of his or her own subjective biases, biases at odds with Title VII's goals. The Court should apply the *Meritor* standards as stated, without importing a reasonableness inquiry.²⁴

2. Application of a "Reasonable Woman" Standard Can Also Create Or Perpetuate Discriminatory Stereotypes.

In an effort to address some of the problems inherent in the "reasonable person" test described above, a num-

²⁴ Should the Court modify the *Meritor* standards to incorporate a reasonableness inquiry, it should carefully craft that inquiry to consider the harassing conduct through the eyes of one who seeks equal access to the workplace and who recognizes the barriers to equal access created by such conduct as status-based slurs, propositions, and fondling, which focus on a woman's sexuality rather than on her competence in her job, and displays in the workplace of material that demeans an entire group.

ber of courts have substituted a "reasonable woman" test for the "reasonable person" test of *Rabidue* and its progeny.²⁵ Nevertheless, the "reasonable woman" test has the potential to undermine Title VII's goals as much as the "reasonable person" test.²⁶

First, the "reasonable woman" standard suffers some of the same infirmities as the "reasonable person" standard. A court may incorporate into the standard the reactions of women who have endured harassment in silence or who have been "conditioned to accept it." Indeed, the courts below did just that. See Pet. App. at A18, A-20-A-21. For example, a court may assume that if women employees other than the plaintiff did not complain about the harassment, it must not have altered *their* working conditions, and therefore should not have altered the plaintiff's. But that assumption would perpetuate discriminatory conditions that Congress wished to eliminate.

Second, fact-finders applying a "reasonable woman" test may imbue that standard with their own biases about the types of jobs that women ought to accept or about the "types" of women who take certain jobs. A fact-finder who believed that women should not work as, say, managers, or welders, or construction workers, might be inclined to find that any woman who would accept such a position "is asking for it." *E.g.*, *Downum v. City of Wichita*, 675 F. Supp. 1566, 1570 (D. Kan. 1986) (invitation to firefighter to join men in the shower because she

²⁵ See, e.g., *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990); *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), appeal docketed, No. 91-3655 (11th Cir. 1991).

²⁶ We recognize that some courts adopting a "reasonable woman" standard have done so in recognition of women's special concerns about sexual threats. See, e.g., *Ellison*, 924 F.2d at 878-80. These good intentions aside, this test has at times been used to deny relief to women with legitimate claims and to reinforce gender-based stereotypes. Petitioner's claim is just such a case.

was "doing a man's job" had a *de minimis* effect); *cf.* Abrams, *supra*, 42 Vand. L. Rev. at 1203. Such a finding would directly contravene Title VII's promise of equal job opportunity to any person who can perform the work.

Finally, although any court reviewing a sex-based or sexual harassment claim must take account of the realities women face, the "reasonable woman" test presents the risk of limiting opportunities for women based on gender stereotypes. It would be inappropriate and contrary to Title VII's purposes to apply any standard that expressly or impliedly rested on, for example, an assumption that women are somehow more delicate than men, and are therefore less able than men to cope with ordinary workplace pressures. Gender-specific standards based on such stereotypes have historically been used to "protect" women in a manner that denied them opportunities in the workplace. *E.g.*, *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding statute that allowed women to serve as waitresses in taverns, but barring them generally from more lucrative positions as bartenders); *cf.* *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219, 1225-27 (9th Cir. 1971) (paternalistic state labor laws restricting employment opportunities for women are no defense to Title VII claim). Such a "protective" approach would only perpetuate the notion that women are incapable of handling the work-related stresses and conflicts that accompany many jobs. Title VII does not and should not insulate women from work-related stresses and conflicts incident to a particular career or occupation.

Seven years ago, this Court held that unwelcome, sex-based conduct constitutes actionable sexual harassment if it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor*, 477 U.S. at 67. The working environment of concern to this Court in *Meritor* was the victim's, not that of some hypothetical composite plaintiff. The Court should reaffirm the standards articulated in *Meritor*.

CONCLUSION

For the reasons stated above, the Court should reverse the decisions below and direct entry of judgment for the petitioner.

Respectfully submitted,

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APPENDIX

APPENDIX

The *Women's Legal Defense Fund* (WLDF) is a non-profit, tax-exempt, national advocacy organization founded in 1971 to advance the rights of women in the areas of work and family. WLDF represents women and men challenging barriers to sexual equality, principally those in employment. It does so through litigation of significant cases, public education, and lobbying for improvements in the equal employment opportunity laws and in their interpretation.

The *National Women's Law Center* ("Center") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since its inception in 1972, the Center has worked continuously to make Title VII's promise of equality in the workplace a reality. The existence of widespread sexual harassment in employment greatly restricts the opportunity for women to participate as full partners in the workplace. The Center has a deep and abiding interest in insuring that Title VII adequately protects women from sexual harassment in employment.

The *American Federation of State, County and Municipal Employees, AFL-CIO* ("AFSCME") is a labor organization with approximately 1.3 million members in the United States. AFSCME members are employed by state, county and municipal governments, as well as private and non-profit employers. Each year AFSCME and its affiliates negotiate hundreds of collective bargaining agreements with public and private employers. AFSCME as an institution and AFSCME members as individuals have an abiding interest in eradicating all forms of sexual harassment from the workplace.

Ayuda, Inc. is a non-profit legal services agency, founded in 1971, which offers legal representation and social service assistance to indigent Spanish-speaking and

foreign born residents of the District of Columbia. Since 1985, Ayuda has represented 98% of the Spanish-speaking battered women who turn to the D.C. Courts for protection. A great number of Ayuda's clients are Latina heads of household who, as well as facing violence at home, suffer all forms of discrimination in the workplace.

The *Bar Association of San Francisco* ("BASF") is a voluntary membership organization of over 9,500 men and women practicing law in San Francisco, California. For many years, BASF has sought to promote the rights of women and minorities to equal protection of the laws as well as the right to be treated with dignity and respect. BASF is especially interested in this case because it believes that working conditions free of sexual harassment are essential to a productive society that values the dignity of all persons.

California Women Lawyers ("CWL") is one of the largest women's bar associations in the nation, representing the interests of over 30,000 women lawyers. CWL's mission is to promote the advancement of women and the achievement of gender parity. Toward that end, CWL has authored sexual harassment policy guidelines for the workplace which have been endorsed by the California/Nevada Women Judges Association, the National Association of Women Lawyers, and numerous law firms and bar associations throughout California.

The *Center for Women Policy Studies* was founded in 1972 as the first national policy research and advocacy institute focused exclusively on issues of social and economic justice for women. The Center conducts research and advocacy programs on sexual harassment, violence against women, employers' work/family and "diversity" policies, education, and other relevant issues.

The *Coalition of Labor Union Women* ("CLUW") is America's only national organization for union women. Not a union itself, CLUW strives to make organized

labor—and the public in general—more sensitive to the needs of working women and their families. CLUW has 75 chapters nationwide and over 20,000 members representing more than 60 unions. Since 1974, CLUW has fought for decent wages and working conditions, and a stronger voice for workers in society.

The *Committee for Justice for Women of North Carolina* was founded in 1988 by women who have suffered human, civil, and constitutional rights violations to educate the public about the injury caused by this illegal and immoral behavior. Having been the victims of sexual harassment, members of the organization have first-hand knowledge of the harm caused by sexual harassment. The organization believes that every person has the right to be treated with dignity and respect and to work in a non-discriminatory environment.

Federally Employed Women, Inc. ("FEW") is an international non-profit organization representing more than 1 million civilian and military women employed by the federal government. Since its inception in 1968, FEW's primary objective has been to eliminate sex discrimination and enhance career opportunities for women in government. FEW has vigorously pursued activities designed to educate workers on the issue of sexual harassment, extend protection and relief to its victims, and insure that employers and employees are held responsible for illegal acts.

The *Federation of Organizations for Professional Women* ("FOPW") is a federation of 30 professional women's organizations founded in 1972 to work together to study the issues that impact the careers of professional women, to educate professional women on those issues and to provide mutual support. FOPW is particularly interested in sexual harassment and discrimination issues because we have found that, aside from severe physical illness, the experience of harassment or discrimination has the single most devastating effect on a professional

woman's career. For this reason, FOPW has established the Professional Women's Legal Fund of FOPW and a Support Group for professional women who have been sexually harassed or discriminated against.

The *Institute for Women's Policy Research* ("IWPR") is a non-profit, scientific research organization that works on issues related to economic and social justice for women. IWPR conducts research on policy issues affecting women's lives and represents women's interests in national policy debates. IWPR takes an interest in *Harris v. Forklift Systems, Inc.* because a work environment free of hostility and inequity is crucial if women are to preserve economic security for themselves and their families.

The *Mexican American Women's National Association* ("MANA") is a non-profit Latina advocacy organization with members in 36 states. Far too many women suffer sexual harassment on the job that goes unreported. MANA is interested in this case because it believes that our laws should not inhibit sexual harassment victims from seeking relief in the courts.

The *National Association of Female Executives* ("NAFE") represents over 250,000 working women for whom it provides educational and advocacy activities related to the members' careers. NAFE members consider sexual harassment to be one of the most important issues confronting working women. NAFE is interested in this case because it will determine important sexual harassment issues for all women.

The *National Association of Social Workers, Inc.* ("NASW") is the largest association of professional social workers in the world with over 142,000 members in 55 chapters nationally and internationally. Founded in 1955, NASW is devoted to promoting the quality and effectiveness of social work practice. A substantial majority of NASW's members are women, many of whom have experienced first-hand sex discrimination in employment. Thus, NASW is keenly interested in the issues raised in this case.

The *National Center for Lesbian Rights* ("NCLR", formerly the Lesbian Rights Project) is a non-profit public interest law firm devoted to the legal concerns of women who encounter discrimination on the basis of their sexual orientation. Founded in 1977, NCLR has a strong history of assisting lesbians who have been discriminated against in the workplace. NCLR has also demonstrated its commitment to equal treatment in the workplace through litigation and community education.

The *National Council of Negro Women, Inc.* ("NCNW"), established in 1935, is a voluntary non-profit membership organization committed to the advancement of educational, social, and economic opportunities for African American women. Through 33 national affiliate organizations and 250 community-based groups in 42 states, NCNW reaches out to 4 million women. As an organization of African American women, the issues of discrimination and harassment are of utmost concern.

9to5, *National Association of Working Women* is a membership organization of working women. As an organization which has spoken to literally thousands of victims of sexual harassment, 9to5 knows well the harm it causes. Any level of embarrassment, intimidation, or humiliation ought not be tolerated in the workplace.

The *Older Women's League* ("OWL") was founded in 1980 to address the concerns of midlife and older women. It presently includes 20,000 members and more than 100 chapters in 36 states. Midlife and older women will be profoundly affected by the issues raised in this case. As an increasingly large part of the workforce, these women often face sex, age, and race discrimination in employment.

Trial Lawyers for Public Justice, P.C. ("TLPJ") is a national public interest law firm that marshals the skills and resources of trial lawyers to create a more just so-

ciety. Supported by a nationwide network of over 1,300 trial lawyers, TLPJ utilizes creative litigation to protect people and the environment, guard access to the courts, and combat threats to our justice system. TLPJ is extremely interested in this case because it will determine whether the courts remain open to all victims of sexual harassment.

Wider Opportunities for Women ("WOW") is a non-profit women's employment organization committed to working nationally and locally in its home community of Washington, D.C. to achieve economic independence and equality of opportunity for women and girls. WOW helps women learn to earn, with programs stressing literacy, technical and non-traditional skills, and career development. Sexual harassment remains one of several barriers that women encounter in the workplace. In order for WOW to achieve its goals, working environments must be made free of sexual harassment and all other forms of discrimination.

Women Employed is a national membership association of 2000 working women based in Chicago. Since 1973, the organization has assisted thousands of working women with sex discrimination problems, analyzed equal opportunity policies, monitored the performance of equal opportunity enforcement agencies, and developed proposals for improving enforcement efforts. Women Employed strongly believes that sexual harassment in the workplace is one of the chief barriers to achieving equal opportunity and economic equity for working women.

Women's Action Alliance ("Alliance"), established in 1971, is a national non-profit organization dedicated to furthering the vision of self-determination for all women. The Alliance creates and implements innovative multicultural programs addressing issues of equity in education and the workplace, health, domestic violence, sexual harassment, and income generation. Alliance programs provide individuals, community organizations,

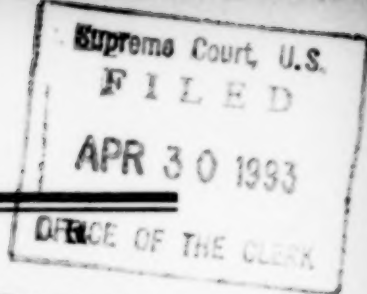
women's centers and schools with strategies and technical assistance to empower women and girls. The organization is dedicated to protecting women's rights in our judicial system.

The *Women's Bar Association of the District of Columbia* ("WBA") is a membership organization composed of nearly 2,000 lawyers, judges, and law students working in private and government practice in the D.C. metropolitan area. Founded in 1917, the WBA is one of the oldest, largest, and most active women's bar associations in the country. The WBA recognizes that sexual harassment in the workplace remains a pervasive problem that impedes women's progress toward equal opportunity.

The *Women's Law Center of Maryland* is an advocacy organization whose membership includes attorneys and judges in the State of Maryland. In existence since 1971, the goal of the Women's Law Center is to promote the legal rights of women through litigation, legislation, and education. The Women's Law Center has a long history of involvement with sexual harassment claims. The Women's Law Center believes the issues raised in *Harris v. Forklift Systems, Inc.* are critical to the legal rights of women.

The *YWCA of the U.S.A.* is part of a world body of YWCAs with associations in 90 countries. In the U.S. alone, there are approximately 400 community and student YWCAs reaching more than 2 million people of diverse ages, races, ethnicities, religions, lifestyles, and interests. Since its inception in 1858, the YWCA has advocated for the rights of women workers and for racial and sexual equality in the workplace. Sexual harassment remains a serious barrier to equal opportunity in the workplace. Any policy that deprives employment discrimination victims of a remedy greatly undermines the goals of our civil rights laws.

9
No. 92-1168



IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TERESA HARRIS,

Petitioner,

v.

FORKLIFT SYSTEMS, INC.,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

BRIEF AMICI CURIAE OF THE NAACP LEGAL
DEFENSE AND EDUCATIONAL FUND, INC. AND
THE NATIONAL COUNCIL OF JEWISH WOMEN
IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TERESA HARRIS,

Petitioner,

v.

FORKLIFT SYSTEMS, INC.,

Respondent.

On Writ of Certiorari To the United States Court of
Appeals For the Sixth Circuit

**BRIEF AMICI CURIAE OF THE NAACP LEGAL
DEFENSE AND EDUCATIONAL FUND, INC., AND
THE NATIONAL COUNCIL OF JEWISH WOMEN
IN SUPPORT OF PETITIONER**

INTEREST OF AMICI CURIAE¹

The NAACP Legal Defense Fund, Inc., is a non-profit corporation that was established for the purpose of assisting black citizens in securing their constitutional and civil rights. This Court has noted the Fund's "reputation for expertness in presenting and arguing difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963). A significant portion of the Fund's litigation has concerned Title VII of the Civil

¹ Letters of consent to the filing of this Brief have been filed with the Clerk of the Court.

Rights Act of 1964 and the proper scope of constitutional and statutory rights to equal employment opportunity.

The National Council of Jewish Women (NCJW), Inc., is a volunteer organization inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the National Council of Jewish Women has 100,000 members in over 500 communities around the country. The National Council of Jewish Women believes that individual liberties and rights guaranteed by the Constitution are keystones of a free and pluralistic society. Based on the NCJW's National Resolutions stating our resolve to work for the "enforcement of sexual harassment laws and more stringent penalties for violators," we submit this brief.

SUMMARY OF ARGUMENT

Since this Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the experience of the lower courts has revealed there are five distinct types of practices that are loosely described as "harassment." These are (1) discrimination in employer mandated terms of employment, (2) facially neutral harassment on account of race or gender, (3) race or gender specific harassment, (4) sexual harassment, and (5) quid pro quo sexual demands.

The magistrate's decision in the instant case was based on the Sixth Circuit decision in *Rabidue v. Osceola Refining Co.*, 805 F. 2d 611, 619 (6th Cir. 1986), which held that harassment is legal under Title VII unless it "affected seriously the psychological well being" of the victim. The rule in *Rabidue* improperly requires victims of harassment to endure that abuse for possibly extended periods of time until the requisite amount of injury has occurred. Until that point is reached *Rabidue* treats the workplace as a "free fire zone." Department of Defense Inspector General, *Tailhook* 91, pt. 2, p. X-1 (1993).

The magistrate held that denigrating and demeaning treatment of women was a recurrent condition of employment at Forklift Systems, but insisted that no violation of Title VII had occurred because that treatment was not "abusive". This Court's decision in *Meritor* recognizes no such distinction.

ARGUMENT

INTRODUCTION

Seven years ago, in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), this Court held that the prohibitions of Title VII are not limited to discriminatory conduct that causes economic injury, but reach any form of mistreatment on the basis of race, sex, national origin or religion.

The application of Title VII to non-economic injury is important for two distinct reasons. First, minorities and women are not afforded equal treatment if, in order to hold the same job or receive the same wages as whites or men, they must endure abuses or bear additional burdens not imposed on others.² Harassment on the basis of race or gender aggravates longstanding injuries and sensitivities rooted in the history of the very discrimination and intolerance which led to the enactment of the 1964 Civil Rights Act.

Second, mistreatment of a non-economic nature is likely to lead, in ways difficult to detect, delineate or remedy, to discrimination in promotion and dismissal, with attendant economic harm. The experience of the lower courts in harassment cases has confirmed what common sense would have suggested; given a choice among otherwise

² "Forcing women and not men to work in an environment of sexual harassment is no different than forcing women to work in a dirtier or more hazardous environment than men simply because they are women." *Bohen v. City of East Chicago, Ind.*, 799 F. 2d 1180, 1165 (7th Cir. 1986).

comparable jobs, minorities and women will understandably choose to work at a plant or office where abuse or other forms of mistreatment are *not* a foreseeable condition of the job. At least if they had any other real alternatives, many women would not take a job at Forklift Systems if they knew they would be treated the way petitioner was, or, in the case of blacks, choose to work at McLean Credit Union under the circumstances alleged by Brenda Patterson. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). In actual harassment cases the victims frequently seek to transfer to other jobs, even if less desirable³, or simply resign.⁴ A pattern of harassment could purge minorities or women from a position or employer as effectively is more direct exclusion. For those who choose to stay, harassment frequently poisons their relations with supervisors and fellow employees.⁵ In the instant case, Hardy's overt harassment of petitioner led other employees to treat her in a similar

³ See, e.g., *Ellison v. Brady*, 924 F. 2d 872, 881-82 (9th Cir. 1991); *Vance v. Southern Bell Tel. and Tel. Co.*, 863 F. 2d 1503, 1508 (11th Cir. 1989); *Yates v. Avco Corporation*, 819 F. 2d 630, 632 (6th Cir. 1987).

⁴ See, e.g., *Daniels v. Essex Group, Inc.*, 937 F. 2d 1264 (7th Cir. 1991); *Brooms v. Regal Tube Co.*, 881 F. 2d 412 (7th Cir. 1989); *Proline v. Unisys Corp.*, 879 F. 2d 100 (4th Cir. 1989).

⁵ "[A]n employee may react angrily to the racial harassment, and may more easily be provoked into arguments or physical altercations with those co-workers responsible for the harassment." *Daniels v. Essex Group, Inc.*, 937 F. 2d 1264, 1272 (7th Cir. 1991). See also *Erebia v. Chrysler Plastics Products Corp.*, 772 F. 2d 1250, 1252 (6th Cir. 1985)(victim "called an hourly employee a 'gringo' after the employee had called him a 'wet back'"); *Horn v. Duke Homes, Div. of Windsor Mobile Homes*, 755 F. 2d 599, 602 (7th Cir. 1985)(after perpetrator had made repeated sexual advances, brushed up against victim's breasts, and demanded sex in return for a raise, victim threatened to "put him in his place with a weapon").

manner (tr. p. 25), and undermined her authority.⁶ Harassment of employees on the basis of race or gender may affect the ambitions and self-esteem of the victims "in a way unlikely ever to be undone." *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).

Notwithstanding the importance of eradicating these types of discrimination, the lower courts have responded in strikingly inconsistent ways to this Court's decision in *Meritor*. Essentially identical facts have been declared a serious violation of Title by one court, but upheld as entirely lawful by another. What is legal or not under Title VII varies not only from circuit to circuit, but from judge to judge. The particular result in this case was dictated by the Sixth Circuit decision in *Rabidue v. Osceola Refining Co.*, 805 F. 2d 611, 619 (6th Cir. 1986), that harassment is permitted by Title VII except where it "affected seriously the psychological well being" of the victim.

We emphasize that all that is at issue in this case is the standard for determining what is lawful under Title VII. In order to obtain one of the various forms of relief available for a violation of Title VII, such as injunctive relief, compensatory damages, punitive damages, back pay, or, in the case of an alleged constructive discharge, reinstatement, a plaintiff may have to establish additional elements. What those elements may be, and whether they were established here, are not before the Court, because the courts below held that the pattern of conduct in this case was entirely lawful, and thus did not reach those remedial questions.

⁶ Sexual harassment can "create an atmosphere in which women are viewed as men's sexual playthings rather than as their equal coworkers." *Barbetta v. Chemlawn Services Corp.*, 669 F.Supp. 569, 573 (W.D.N.Y. 1987).

I. THE ACTIONS CHARACTERIZED BY THIS COURT AND THE LOWER COURTS AS "HARASSMENT" ENCOMPASS SEVERAL DISTINCT TYPES OF PRACTICES

Section 703(a) of Title VII forbids an employer "to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Disparate treatment, which is the gravamen of this action, is the most obvious evil that Congress had in mind when it enacted Title VII. Disparate treatment occurs when an employer "treats some people less favorably than others because of their race, color, religion, sex, or national origin." *Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977). There is no requirement that an employer have harbored any "animus against" the group subjected to unfavorable treatment; an employer which engages in disparate treatment of a protected group is liable under Title VII even though it may have been "favorably disposed toward" its victims. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 668-69 (1987).

Meritor of course held that the disadvantage imposed by the disparate treatment need not be economic. The Court used a variety of terms to describe disadvantageous circumstances that might cause injury of a non-economic nature, including "hostile", "offensive", "intimidating", and "abusive", or involving "ridicule" or "insult".⁷ These terms were illustrative of the types of circumstances that might cause non-economic injury. Although *Meritor* and the EEOC Guidelines use the phrase "hostile environment" to summarize these circumstances, the term "hostile" is employed in the broad sense of inhospitable or discriminatory. Disparate treatment is equally unlawful whether the perpetrator intended to harm the victim or merely thought discrimination and derogatory abuses were amusing. Derogatory jokes which cast a protected group in an unfavorable light are disparate treatment fully as much as

⁷ 477 U.S. at 62-73.

non-humorous slurs.⁸

A. The Types of Practices Involved in "Harassment" Cases

The decisions of this Court and the lower courts have characterized as "harassment" at least five different types of practices. We set forth in an Appendix to this brief a list of reported appellate decisions in which these practices were found or alleged to have occurred, and summarize them briefly below.

(1) Discrimination in Employer Mandated Terms of Employment—

An inherent part of the employment relationship is that the employer is entitled, subject to certain legal constraints, to direct how an employee, and his or her fellow employees, will act during the period they are at work. Employers routinely determine to a large degree what tasks employees will perform and how they will do so, as well as controlling, often in considerable detail, how employees will act while at the plant or office.

A number of the so-called harassment cases involve situations in which the employer utilized this authority to mandate for women or minorities terms of employment that were both different than and disadvantageous compared to the treatment of other comparable workers. For example, in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the black plaintiff alleged she had been required to do more work than whites, and had been assigned to dust and sweep when white bank employees in the same position were not. In the instant case petitioner alleged she was repeatedly sent out to get coffee, a menial task fraught with stereotyped

⁸ See, e.g., *Lipsett v. University of Puerto Rico*, 864 F. 2d 881 906 (1st Cir. 1990) ("Belittling comments about a person's ability to perform, on the basis of that person's sex, are not funny."); *Hamilton v. Rodgers*, 791 F. 2d 439, 441 (5th Cir. 1986); *Snell v. Suffolk County*, 611 F. Supp. 521, 528-30 (E.D.N.Y. 1985).

overtones, that was never imposed on male managers.⁹ See, e.g., EEOC Dec. No. 71-2042, 3 FEP Cas. 1102, 1103 (1971)(black but not white employees required to address white female supervisor as "ma'am"); *Carroll v. Talman Federal Savings & Loan Ass'n*, 604 F. 2d 1028 (7th Cir. 1979)(female but not male bank employees required to wear uniforms).

(2) Facially Neutral Harassment on Account of Race or Gender—

Supervisors and fellow employees seeking to abuse minorities or women have often chosen to use facially neutral methods, resorting to abusive conduct or derogatory remarks that could conceivably have been, but in fact were not, inflicted on men or non-minorities. Thus in *Patterson* the plaintiff alleged her supervisor glared at her, criticized her more than whites, and chastised only her, and never whites, in public. 491 U.S. at 212, 214. In the instant case Hardy times belittled petitioner with facially neutral remarks, not directed at male employees, such as "What the hell do you know." (Tr. 18).

(3) Race or Gender Specific Harassment—

In many of the reported lower court cases the substance of the abuse was something that by its very nature would harm only (or primarily) women or minorities. In *Patterson*, for example, the plaintiff's supervisor allegedly asserted to her that "blacks are known to work slower than whites by nature", and that whites could her job better than she could. 491 U.S. at 213. In the instant case Hardy told petitioner that a man was needed to do her job, and remarked "what do you know, you're a woman."¹⁰ At the

⁹ The magistrate asserted that this occurred on only a single occasion. (Pet. App. A-8) This was clear error; petitioner testified that this was Hardy's routine practice, and no witness disputed her assertion.(Tr. 19-20).

¹⁰ Tr. 17, 18, 78, 91; Pet. App. A-9, A-18.

1991 Tailhook convention several of the male officers wore T-shirts reading "HE-MAN WOMEN HATER'S CLUB" and "WOMEN ARE PROPERTY."¹¹

(4) Sexual Harassment—

This Court's decision in *Meritor*, like many of the lower court cases, dealt with disparate treatment in the form of "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." 477 U.S. at 65, quoting 29 C.F.R. §1604.11(a). The touchstone of any sexual harassment claim is that the alleged sexual advances were "unwelcome." 477 U.S. at 98. Such advances, requests and conduct are by definition directed at employees, in virtually all reported cases women, because of their sex. The record in this case is replete with incidents of this type.

(5) Quid Pro Quo Sexual Demands—

In a number of cases supervisors have demanded sexual favors in return for a favorable employment action, such as a promotion, or on pain of an adverse employment action, such as dismissal. Most of these cases are a subset of discriminatory promotion and dismissal cases. If the woman rejects the demand and is denied the promotion¹² or fired¹³, she has been denied the promotion or fired on account of her gender; a man in the same situation would have been promoted or retained.

¹¹ Department of Defense Inspector General, *Tailhook 91*, pt. 2, p. X-3 (1993).

¹² See, e.g., *Henson v. City of Dundee*, 682 F. 2d 897 (8th Cir. 1982); *Bundy v. Jackson*, 841 F. 2d 934 (D.C.Cir. 1981).

¹³ See, e.g., *Sparks v. Pilot Freight Carrier, Inc.*, 830 F. 2d 1554 (11th Cir. 1987); *Horn v. Duke Homes, Division of Windsor Mobile Homes, Inc.*, 755 F. 2d 599 (7th Cir. 1985).

B. *The Legal Principles Applicable to Each*

The experience of the lower courts reveals that several different types of harassment often arise in a single case. That is true in the instant case, which involves discrimination in employer-imposed terms of employment, facially neutral harassment on account of gender, gender specific harassment, and sexual harassment. The combined impact of multiple types of harassment may be relevant to determining liability¹⁴, and will ordinarily be important to ascertaining the appropriate remedy, such as the proper level of compensatory damages. Nonetheless, the legal principles applicable to each form of harassment differ to some degree, and must be assessed separately.

Meritor held that in a hostile environment case a plaintiff was required to establish that the harassment at issue was "sufficiently pervasive or severe" to alter the conditions of [the victim's] employment." 477 U.S. at 67. This requirement is applicable to a claim of facially neutral harassment on account of race or gender, race or gender specific harassment, or sexual harassment. It does not apply, however, to discrimination in employer imposed terms of employment; where an employer, for examples, selects an employee on the basis of race or sex for assignment to a demeaning or dangerous task, that assignment is a per se violation of Title VII, whether it lasts for a day or a year. The "pervasive or severe" requirement is also inapplicable to a quid pro quo case,¹⁵ if the victim refused the supervisor's demand, and as a consequence was fired or denied a promotion. In that situation the dismissal or promotion would constitute unlawful discrimination on account of sex, since a similarly situated male would have been promoted or

¹⁴ *Hicks v. Gates Rubber Co.*, 833 F. 2d 1406, 1416-17 (10th Cir. 1987); *Carter v. Duncan-Huggins, Ltd.*, 727 F. 2d 1225, 1236 (D.C.Cir. 1984).

¹⁵ The Sixth Circuit acknowledged this distinction in *Rabidue*. 805 F. 2d at 620.

retained.

Practical experience since *Meritor* has demonstrated the value of the two part "pervasive or severe" standard. In most harassment cases, whether an abuse is an isolated incident, or has become an ongoing condition of the job, turns on pervasiveness, the frequency with which it recurs. Where an employee can anticipate that an abuse is going to occur again on the job, the perpetration of such abuses can properly be described as a condition of the job.¹⁶ This is consistent with what would, as a practical matter, begin to affect the employment decisions of current or prospective employees. Both types of individuals would begin to avoid a given employer once it was foreseeable that its employees would be subject to harassment. If at that point the harassment could not be declared illegal and enjoined, the abuse would continue unchecked to steer minorities or women away from the employer. The EEOC Guidelines require an employer who has learned of harassing conduct to take "appropriate corrective action," 29 C.F.R. §1604.11(d), a requirement which imposes on the employer an obligation to act where recurrences of the harassment are foreseeable.¹⁷ That obligation would make no sense unless

¹⁶ Compare *North v. Madison Area Ass'n for Retarded Citizens*, 844 F. 2d 401 (7th Cir. 1988)(two or three incidents in ten years not sufficient to constitute a condition of employment) with *Carrero v. New York City Housing Authority*, 890 F. 2d 569 (2d Cir. 1989)(condition of job altered where half a dozen of unwanted sexual advances from the same supervisor created a situation in which victim was "required to be constantly on guard against having her supervisor fondle her knee, kiss her on the neck, or seek to kiss her on the lips.").

¹⁷ See EEOC Policy Guidance on Current Issues of Sexual Harassment, p. 30 (March 19, 1990)("The employer should make follow-up inquiries to ensure that harassment has not resumed . . ."); *Ellison v. Brady*, 924 F. 2d 872, 881 (9th Cir. 1991)(employer must take action "reasonably calculated to end the harassment"); *Paroline v. Unisys Corp.*, 879 F. 2d 100, 107 (4th Cir. 1989)(where employer knew perpetrator had harassed other women, employer "should have

the pervasiveness requirement of *Meritor* could be satisfied by proof the sufficient harassment had occurred that additional future acts could be foreseen.

The second branch of the *Meritor* standard, providing that severity may also be sufficient to render harassment a condition of the plaintiff's employment, has also proved important. The EEOC has concluded that a single but severe incident may be sufficient to alter the conditions of employment, such as "the unwelcome, intentional touching of a charging party's intimate body areas."¹⁸ The lower courts have found that a plaintiff's conditions of employment are altered by circumstances creating a legitimate fear of serious and irreparable injury, such as a threat of death or rape, even though the threatened conduct has not occurred.¹⁹ Continuous fear of severe injury can in such cases be as much a condition of the job as actual day to day abuse of a less extreme variety. Such fear would obviously shape employment decisions by current or prospective employees. There are a significant number of lower court cases involving threats or actual attacks of this severity.²⁰

anticipated that the plaintiff too would become a victim of the male employee's harassing conduct"); *Lopez v. S.B. Thomas, Inc.* 831 F. 2d 1184, 1186 (2d Cir. 1987) ("when an employer knows or reasonably should know that co-workers are harassing an employee . . . the employer may not stand idly by").

¹⁸ EEOC, Policy Guidance on Current Issues of Sexual Harassment, p. 17 (March 19, 1990).

¹⁹ *Vance v. Southern Bell Tel. and Tel. Co.*, 863 F.2d 1503, 1510-11 (11th Cir., 1989)(death); *Ellison v. Brady*, 924 F. 2d 872, 883 (9th Cir. 1991)(rape).

²⁰ *Daniels v. Essex Group, Inc.*, 937 F. 2d 1264, 1266-67 (7th Cir. 1991)(death threat, threat of assault, bullet fired into employee's home); *Andrews v. City of Philadelphia*, 895 F. 2d 1469, 1474 (3d Cir. 1990)(plaintiff burned by lime poured on her clothes); *Paroline v. Unisys Corp.*, 879 F. 2d 100, 105-06 (4th Cir. 1989)(assault and battery); *Bohen v. City of East Chicago, Ind.*, 799 F. 2d 1180, 1183

In applying *Meritor* the courts must determine whether the alleged conduct was unfavorable to the employee, e.g. whether an employer-imposed condition was undesirable, whether remarks about a plaintiff were derogatory, and whether unwelcome conduct or remarks were sexual in nature. In practice the court have had no difficulty in making these determinations; in the actual reported cases the unfavorable or sexual nature of the incidents in question has almost invariably been so blatant that it was never contested.²¹ There is no dispute here, for example, that saying that only a man could do petitioner's job was a gender specific denigration of female employees, or that suggestions that petitioner start "screwing around" with Hardy referred to sexual activity. Should such disputes actually arise, the finder of fact should experience little difficulty in determining whether, for example, a series of remarks might fairly be understood as derogatory or sexual in nature.

II. THE SIXTH CIRCUIT REQUIREMENT OF PROOF OF SERIOUS PSYCHOLOGICAL INJURY IS INCONSISTENT WITH TITLE VII AND THIS COURT'S DECISION IN *MERITOR SAVINGS BANK V. VINSON*

A. The Rationale of the Opinion in *Rabidue Flatly Repudiates The Principles of Title VII*

The rule adopted in *Rabidue* and applied by the magistrate below, as we set out below, is clearly wrong. The reasoning of *Rabidue* is equally significant, because the rule

(7th Cir. 1986)(rape threat); *Snell v. Suffolk County*, 782 F. 2d 1094, 1098 (2d Cir. 1986)(fear fellow police officers would not assist in an emergency).

²¹ One of the few such cases is *Ellison v. Brady*, 924 F. 2d 872, 875 n. 5 (9th Cir. 1991), in which the employer argued in vain that a letter which contained "several references to sex" was "not of a sexual nature."

in question derives from a candid rejection of Congress's decision to eliminate harassment and abuse in the workplace. The panel in *Rabidue* offered a spirited defense of harassment of women, particularly on the job, as a widespread, normal, and generally accepted practice, insisting it was impossible to stop and that Congress surely could not have meant to do so. This is, the panel suggested, just the way women are normally treated. The reasoning of this decision bears an uncanny resemblance to the cavalier attitude of a company official in *Walker v. Ford Motor Co.*, 684 F. 2d 1355 (11th Cir 1982), who told a black employee that constant references to himself and other blacks as "niggers" was "just something a black man would have to deal with in the South." 684 F. 2d at 1359.

Rabidue argued, first, that women are demeaned in American society generally, and that comparable harassment on the job surely cannot be actionable:

[The actions] had a de minimis effect on the plaintiff's work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, at the cinema, and in other public places.

805 F. 2d at 622. On this view, whatever is said or depicted in, for example, Hustler magazine or hard core pornography could be said to, or insistently displayed before, any woman who chooses to work for a living.

This argument ignores the fact that a woman who may refuse to enter a pornographic bookstore or movie theater is *required* to be at her place of employment during business hours. Employees are the quintessential captive audience. Individuals are free to stay away from, or walk out of, a store or political rally because of the slightest difference in opinion or taste; but those same individuals are required by their employers, on pain of dismissal, to remain

on the job despite the most withering abuse. Probably nothing short of physical confinement or the threat of criminal prosecution could as effectively compel an individual's continued presence as fear of dismissal; employees depend on their jobs to feed, clothe and house themselves and their families. So long as an employee is required by his or her employer to be at a particular plant or office, Title VII imposes on the employer an obligation to assure that the conditions at that site are not tainted by discriminatory harassment. By so doing Title VII merely accords to petitioner and other women while on the job the same ability to avoid unwelcome sexual remarks and displays that they possess when not at work.

Rabidue argued, second, that verbal and other abuse is widespread at the workplace, more or less normal there, and reflects societal mores, and that Title VII was not adopted to change such common and widespread workplace bigotry:

As Judge Newblatt aptly stated . . . "Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girly magazines may abound. Title VII was not meant to—or can—change this. It must never be forgotten that Title VII is the federal mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers."

805 F. 2d at 620-21. We urge, on the contrary, that Congress intended to bring about just such a transformation. In 1964 racial bigotry also "abound[ed]" in some, indeed all too many, "work environments"; Congress certainly

contemplated that the non-discriminatory terms and conditions of employment guaranteed by Title VII would bring to an end race-based abuse of minority workers by their coworkers and supervisors. Nothing in the language or legislative history of Title VII suggests that harassment of women was to be treated any differently. Title VII does not require American workers to alter their social mores regarding race, sex, or any other matter; they remain free, as to employers, to adhere to whatever views they choose on matters of race, religion, or gender. What Title VII emphatically does require is that employees and supervisors who may adhere to such intolerant beliefs not act on them at the workplace in a manner harmful to their fellow workers.²²

Rabidue urged, third, that women who go to work frequently know they are going to be sexually harassed, and voluntarily choose to take the jobs anyway. Thus *Rabidue* asserted that in deciding whether a given set of abuses is legal, a court should consider "the lexicon of obscenity that pervaded the environment of the workplace . . . before the plaintiff's introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment." 805 F. 2d at 620 (Emphasis added). On this view Title VII is subject to an unstated loophole analogous to the tort doctrine of assumption of the risk; employees who should have known when they took a job that they might be discriminated cannot complain when discrimination in fact occurs. If Title VII indeed contained such an assumption, it would have been inapplicable to most black employees in the nation when it became effective in 1965.

²² "[A]n employer . . . cannot change the personal beliefs of his employees; he can let it be known, however, that racial harassment will not be tolerated, and he can take all reasonable measures to enforce this policy." *DeGrace v. Rumsfeld*, 614 F. 2d 796, 805 (1st Cir. 1980).

Assumption of the risk has proved a useful doctrine in allocating responsibility where individuals voluntarily choose a course of action with known dangers, such as the risk of being struck by a ball at a baseball game. But for women, as for men, working is not a "voluntary" optional pastime like going to baseball games. Women need to work for exactly the reason that men do, to feed, house and clothe themselves and their families. For women working is only as voluntary as eating is voluntary; without jobs most could not provide themselves and their families with a decent standard of living, and many could hardly survive.²³ Assumption of the risk as a defense for employers to injuries sustained by employees was decisively rejected by virtually every state in the union in the early twentieth century with the adoption of workmen's compensation laws. *Prosser On Torts*, section 80.

B. The Substance of the Rabidue Rule Is Inconsistent With Title VII

As *Meritor* explained, disparate treatment on account of race, sex, etc. is discrimination, and thus illegal under Title VII, regardless of whether the harm it causes is economic or non-economic. The plain language of the law forbids "discrimination", not "discrimination if it happens to cause serious psychological injury". Where economic injury

²³ In *Burns v. McGregor Electronic Industries, Inc.*, 955 F. 2d 559 (9th Cir. 1992), the plaintiff was subject to constant hideous verbal abuse, a rape threat, and warning of dismissal if she did not engage in sex with her supervisor. One supervisor constantly touched the women employees, and on at least one occasion dropped his pants in front of several female workers. A female coworker described the plant as the "last resort of anybody that needs a job". 955 F. 2d at 562. The plaintiff quit on several occasions, reluctantly returning because "she needed work to support herself, her father, and her brother." 955 F. 2d at 561.

See also *Phillips v. Smalley Maintenance Services, Inc.*, 711 F. 2d 1524, 1527 (11th Cir. 1983) (supervisor insisted that plaintiff "engage in oral sex with him on penalty of losing her job, upon which he knew she and her family were significantly, financially dependent.")

is concerned, there surely is no such "serious injury" rule; an employee wrongfully denied \$1 in wages on account of race, sex, religion or national origin would be entitled to sue for back pay under Title VII, and could obtain an injunction against such denials in the future, modest in amount though those denials might be. *Meritor* rejects any different rule merely because the injury is non-economic.

Rabidue holds that Title VII authorizes an employer to permit, condone or even enthusiastically sponsor sexual or racial harassment up until the point where it "affect[s] seriously the psychological well being of the plaintiff". 805 F. 2d at 619. The threshold of illegality under *Rabidue* is quite high; in the only Sixth Circuit decision holding this requirement satisfied, the plaintiff was repeatedly forced to seek medical help, and was twice hospitalized because of the psychological harm she had suffered.²⁴ Short of such extraordinary injury, *Rabidue* creates what has elsewhere been described as a "free fire zone" for abuse of female and minority employees. Department of Defense Inspector General, *Tailhook 91*, pt. 2, p. X-1 (1993). Surely Congress never intended to require victims of discrimination to endure such conditions until their injuries had reached some egregious levels. "Title VII's protection of employees from sex discrimination comes into play long before the point where victims of sexual harassment require psychiatric assistance." *Ellison v. Brady*, 924 F. 2d 872,878 (9th Cir. 1991)²⁵.

Under Title VII as it existed prior to 1991, the *Rabidue* rule would yield results that Congress could not possibly have intended. Until 1991 a plaintiff sustaining only non-economic injuries as a result of racial or sexual

²⁴ *Yates v. Avco Corporation*, 819 F. 2d 630, 632 (6th Cir. 1987).

²⁵ "A female employee need not subject herself to an extended period of demeaning and degrading provocation before being entitled to seek the remedies provided by Title VII." *Carrero v. New York City Housing Authority*, 890 F. 2d 569, 578 (2d Cir. 1989).

harassment could not obtain any form of monetary relief under Title VII. Under that circumstance, *Rabidue* interpreted Title VII to require victims of such harassment to endure injury-causing harassment until it led to "serious psychological injury", even though there was no hope that that injury could ever be redressed. Even when the required level of serious injury had been reached, the plaintiff was authorized only to *begin* the process of invoking Title VII by filing an administrative charge; in most instances years would go by before the matter could reach court, a trial could be held, and injunctive relief obtained.

Rabidue is equally indefensible under Title VII as amended by the 1991 Civil Rights Act, which now authorizes awards of compensatory damages. Congress in 1991 expressly authorized compensation for all damages, not just for damages amounting to serious psychological injury. Section 102 of the 1991 Civil Rights Act authorizes compensatory damages for "emotional pain, suffering . . . [and] mental anguish". 42 U.S.C. §1977A(b)(3). All such damages could be suffered even though a plaintiff's psychological well being had not been seriously injured. Moreover, Congress in 1991 was clearly concerned about the size of potential judgments against employers; it was for this reason that section 102 imposes a partial cap on the size of certain compensatory awards. Rather than permit a plaintiff to sue when her injuries and compensatory damage claim may still be modest, however, *Rabidue* has the perverse effect of requiring a plaintiff to postpone suing until both her injuries and damages are quite considerable. By the time proven harassment had "affected seriously the psychological well being" of a plaintiff, his or her injuries in monetary terms are likely to be quite large. Congress cannot have intended to require that a woman or minority who has sustained a \$1000 injury postpone suit until his or her injuries have reached \$100,000, and it is difficult to see why employers, except the defendant in the particular circumstances of this case, would want such a rule.

The *Rabidue* rule is also inconsistent with the principles applicable to constructive discharge claims. Serious psychological injury, unlike lost wages, is never fully undone by a monetary award. Emotional scars from such injuries are likely to last a lifetime; notwithstanding whatever psychologists and psychiatrists can accomplish, a minority or female employee whose psychological well being has been seriously harmed is unlikely to ever be the same again. Absent truly desperate financial circumstances, which of course are all too common, no woman or minority would choose to remain on a job until she or he had suffered irreparable psychological harm. Thus long before, under *Rabidue*, a woman could sue for sexual harassment, she would in all likelihood have resigned and brought a successful constructive discharge suit. See *Bell v. Crackin Good Bakers, Inc.*, 777 F. 2d 1497, 1500 (11th Cir 1985)(sustaining constructive discharge claim where plaintiff had resigned to avoid "permanent severe physical and mental problems.")

III. THE MAGISTRATE'S EVALUATION OF THE CIRCUMSTANCES OF THIS CASE WAS INCONSISTENT WITH TITLE VII

The magistrate's assessment of the largely undisputed facts in this case reflects a fundamental misunderstanding, rooted in *Rabidue*, of the requirements of Title VII. The magistrate correctly held that Hardy, the president and owner of Forklift, "demeans the female employees at his work place" (Pet. App. A-14), a constant practice that indisputably was a condition of petitioner's job. The magistrate insisted, however, that this was insufficient to establish a violation of the law, reasoning that Title VII actually permits demeaning and discriminatory terms and conditions of employment so long as they are not so severe as to amount to a "hostile" or "abusive" environment. In order to implement this distinction, the magistrate fashioned a system for rating derogatory remarks from "merely annoying and insensitive" to "truly gross". (Pet. App. A-18,

A-19). The magistrate classified most of the incidents in this case as falling short of "offensive"; although acknowledging that petitioner was "genuinely offended" (Pet. App. A-19), the magistrate insisted that she was "more sensitive" than other female employees.(Pet. App. A-18).

This Court would dismiss out of hand such scholastic distinctions if they were made in a race discrimination case. The magistrate's analysis bears a substantial resemblance to the reasoning of *Plessy v. Ferguson*, 163 U.S. 537 (1896), which insisted that racial segregation of railroad cars did not "stam[p] the colored race with a badge of inferiority", and that any such impression on the part of blacks existed only because "the colored race chooses to put that construction upon it." 163 U.S. at 551. The day is long past when this Court would entertain any suggestion that some forms of racial abuse are legal because "reasonable" blacks would not be offended. Undoubtedly there were many whites a generation ago who thought Rosa Parks "oversensitive" when she objected to sitting in the back of a Montgomery bus, or who believed Oliver Brown was "unreasonable" in asking that his daughter attend the white schools in Topeka. But the right to equal treatment accorded blacks by the Constitution and laws of the United States does not ebb and flow with popular or judicial notions of what forms of discrimination a "reasonable" black would find tolerable or "merely annoying".

Faced with a pattern of undisputed "denigrating" remarks (Pet. App. A-18), the magistrate classified most as "merely" "annoying", "insensitive", "inane" and "more objectionable" (Pet. App. A-18), none of which, he held, were sufficient, although pervading the workplace, to violate Title VII. It is inconceivable that the magistrate would have used, or that any court would have upheld, such a rating system had the remarks been racial in nature. Title VII surely does not authorize federal judges to draw such distinctions among epithets such as "nigger", "nigra", "spook", "coon", "jungle bunny" and "gorillas in the mist". A lower court decision dismissing some of these epithets as "merely

annoying and insensitive" would be reversed out of hand. Title VII does not permit federal judges to make similar distinctions regarding unwelcome sexual comments or conduct.

The lower court in this and other cases attempted to determine how much a "reasonable" woman would be offended by certain derogatory or unwelcome sexual remarks that were part of the conditions of her job. Those courts, not surprisingly, have arrived at complex and conflicting answers. We maintain that these decisions are asking the wrong question. The relevant inquiry is what forms of derogatory and unwelcome sexual remarks or conduct Title VII requires *any* woman to endure as a condition of her job. The answer is simple--*none*.

Neither this case, nor the numerous reported cases which we have reviewed, involve any genuine misunderstanding even by the perpetrator regarding what actions or derogatory remarks are likely to give offense²⁶. The distinctions drawn by perpetrators concern not the substance of their actions, but the status and powerlessness of their victims. In dealing with women who exercise authority or control over their lives, men otherwise given to making abusive remarks act quite differently. In a context in which he was unprotected by his status as employer, Hardy would have had no difficulty recognizing that his comments were more than "merely annoying." It is unimaginable that Hardy, in applying for a business loan, would ever ask a female bank officer to take coins out of his pocket (Pet. App. A-9, A-18) or comment that her nipples were visible when the air conditioning was on. (Tr. 76) The churlish louts who shout obscenities at women on city streets often understand full well the offensiveness of their conduct; they assuredly do not use similar language when speaking with female personnel officials in the course of job interviews.

²⁶ Hardy acknowledged that he would not stand for it if someone talked to his wife or daughter the way he had spoken to petitioner. Tr.73; see tr. 47, 117.

The magistrate dismissed as peccadilloes Hardy's derogatory remarks, such as his repeated statements that women were not competent to do men's work. It is unlikely that either the magistrate or Hardy would take the same remarks as lightly if uttered about racial minorities. To put the matter bluntly, neither Hardy nor the magistrate would walk into a bar in Northeast Washington, D.C., and announce to the black patrons that only whites were competent to be sales managers. To the extent that the magistrate may actually have believed that women would find Hardy's actions "merely annoying", he was palpably mistaken. If Hardy were to approach a female patron at a Gold's Gym, and ask her, as he asked his employees, to bend over so that he could better observe her breasts (Tr.23-24), that "merely insensitive" remark might well place Hardy in need of immediate medical attention.

The use of this sort of "reasonable woman" standard has led defense lawyers to argue that any woman complaining about their client's conduct must be unreasonable, oversensitive, or worse. Defendants have sought to challenge plaintiffs' objections to sexual or gender-based harassment by seeking to discover information about their psychological or sexual histories²⁷. The notion that objections to certain forms of discriminatory conditions and abuses may be "unreasonable" leads inevitably to arguments, reminiscent of the old Soviet system of remanding dissidents to mental hospitals, that women who object to unwelcome sexual acts or remarks must be unstable.

The magistrate expressed bafflement that petitioner had not chosen to rebuke her employer about his obnoxious actions. (Pet. App. A-15). That observation reflects the happy innocence of a federal official who serves for an eight year term under judges who serve for life. Ordinary American workers, who hold their jobs at the pleasure of their supervisors, do not ordinarily make a practice of rebuking their superiors for engaging in illegal and offensive

²⁷ *Priest v. Rotary*, 98 F.R.D. 755 (N.D.Cal. 1983).

conduct. Women and minorities often use the same word to describe individuals who confronted their bosses in this manner--unemployed.

It is extraordinary that a federal magistrate, a federal district court judge, and three circuit court judges could all have reviewed the facts in this case and have concluded that Title VII permits the abuses which occurred. That result reflects a profound misunderstanding of the commands of federal law. The decisions below proceed as though Title VII guaranteed only "employment opportunity sufficiently equal to satisfy a reasonable woman." The actual terms of Title VII call for "Equal Employment Opportunit[y]", period. 42 U.S.C. ch.21, subch.vi. We urge this Court to so hold.

CONCLUSION

For the above reasons the decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDICES

Appendix A —

Discrimination in Employer Mandated Terms of Employment

Appendix B —

Facially Neutral Harassment On Account of Race or Gender

Appendix C —

Race or Gender Specific Harassment

Appendix D —

Sexual Harassment

Appendix E —

Quid Pro Quo Sexual Demands

Appendix A
Discrimination in Employer-Mandated
Terms of Employment

- Andrews v. City of Philadelphia**, 895 F.2d 1469 (3d Cir. 1990) (plaintiff denied desirable assignment given to comparable male employees)
- Carrero v. New York City Housing Authority**, 890 F.2d 569 (2d Cir. 1989) (plaintiff denied desired assignment)
- Malhotra v. Cotter & Co.**, 885 F.2d 1305 (7th Cir. 1989) (plaintiff given excessive work)
- Risinger v. Ohio Bureau of Workers' Compensation**, 883 F.2d 475 (6th Cir. 1989) (unequal treatment regarding visitors, phone usage, and assignments)
- EEOC v. Hacienda Hotel**, 881 F.2d 1504 (9th Cir. 1989) (discrimination regarding days off)
- Lipsett v. University of Puerto Rico**, 864 F.2d 881 (1st Cir. 1988) (unequal rest and dwelling areas for male and female residents; female residents expected to cook for other doctors; female residents denied assignments given to male residents)
- Vance v. Southern Bell Tel. and Tel. Co.**, 863 F.2d 1503 (11th Cir. 1989) (plaintiff denied needed training)
- Huddleston v. Roger Dean Chevrolet, Inc.**, 845 F.2d 900 (11th Cir. 1988) (discrimination in job assignments, hours, and vacation times)
- Hicks v. Gates Rubber Co.**, 833 F.2d 1406 (10th Cir. 1987) (plaintiff directed to jump off five foot loading dock; not permitted to sit down; denied lunch break)

Nazaire v. Trans World Airlines, Inc., 807 F.2d 1372 (7th Cir. 1986) (plaintiff assigned to do the work of two men; denied adequate training)

Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1988) (plaintiff denied entertainment privileges; barred from firm golf matches; not permitted, as were her predecessors, to take customers to lunch; required, despite management position, to sit with clerical workers at meeting)

Snell v. Suffolk County, 782 F.2d 1094 (2d Cir. 1986) (plaintiffs barred from more desirable positions; barred from use of white bathroom)

Carroll v. Talman Federal Savings and Loan Ass'n, 604 F.2d 1028 (7th Cir. 1979) (female but not male bank employees required to wear uniforms)

Harrington v. Vandalia-Butler Board of Education, 585 F.2d 192 (6th Cir. 1978) (male but not female physical education instructors provided with offices and with showers and lockers not shared with students)

Gray v. Greyhound Lines, East, 545 F.2d 169 (D.C.Cir. 1976) (assignment of bus routes)

Rodgers v. EEOC, 454 F.2d 234 (5th Cir. 1971) (hispanic employee required to attend patients segregated on the basis of national origin)

Appendix B
Facially Neutral Harassment On
Account of Race or Gender

Burns v. McGregor Electronic Industries, Inc., 955 F.2d 559 (8th Cir. 1992) (co-worker called plaintiff vulgar names, deliberately placed need materials where she could not reach them)

Daniels v. Essex Group, Inc., 937 F.2d 1264 (7th Cir. 1991) (co-worker threatened to "whip" or "beat" plaintiff and injure his four-year-old son; bullet fired into plaintiff's home)

Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990) (plaintiff's case files stolen and destroyed; fellow workers refused to provide plaintiff routine assistance; plaintiff's car repeatedly vandalized; anonymous harassing phone calls; plaintiff burned by lime placed on her clothes)

Carrero v. New York City Housing Authority, 890 F.2d 569 (2d Cir. 1989) (spurned supervisor referred to plaintiff as a "scarecrow"; threatened to fail plaintiff on her probationary report; criticized plaintiff publicly)

Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989) (threat by supervisor to kill plaintiff)

Wheeler v. Southland Corp., 875 F.2d 1246 (6th Cir. 1989) (supervisor critical of plaintiff's job performance)

Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) (female residents told they were to "lick the floor" if ordered to do so)

- Vance v. Southern Bell Tel. and Tel. Co., 863 F.2d 1503 (11th Cir. 1989) (plaintiff's work sabotaged; noose repeatedly tied over her desk)
- Davis v. Monsanto Chemical Co., 858 F.2d 345 (6th Cir. 1988) (plaintiff's time card altered)
- Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900 (11th Cir. 1988) (ridicule of plaintiff's appearance; interference with plaintiff's sales efforts)
- Hall v. Gus Construction Co., Inc., 842 F.2d 1010 (8th Cir. 1988) (co-workers urinated in plaintiff's water bottle and gas tank; refused to fix carbon monoxide leak in her company truck)
- Swentek v. USAir, Inc., 830 F.2d 552 (4th Cir. 1987) (disparaging remarks about plaintiff's age and weight; non-sexual prank in presence of federal officials)
- Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307 (5th Cir. 1987) (co-worker choked plaintiff)
- Nazaire v. Trans World Airlines, Inc., 807 F.2d 1372 (7th Cir. 1986) (plaintiff slapped by co-worker)
- Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417 (7th Cir. 1986) (co-workers sabotaged and hid plaintiff's tools; sabotaged his work; hang-man's noose)
- Hamilton v. Rodgers, 791 F.2d 439 (5th Cir. 1986) (nasty pranks)
- Snell v. Suffolk County, 782 F.2d 1094 (2d Cir. 1986) (plaintiff's car vandalized; harassing phone calls)

- Bell v. Crackin Good Bakers, Inc., 777 F.2d 1497 (11th Cir. 1985) (supervisor yelled at plaintiff; talked to her as if she were two year old and two inches high)
- McKinney v. Dole, 765 F.2d 1129 (D.C. Cir. 1985) (supervisor grabbed and twisted plaintiff's arm, causing serious physical injury)
- Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1981) (physical threats)
- DeGrace v. Rumsfield, 614 F.2d 796 (1st Cir. 1979) (firefighting equipment sabotaged; threatening notes; "silent treatment" by co-workers)

Appendix C
Race or Gender Specific Harassment

Daniels v. Essex Group, Inc., 937 F.2d 1264 (7th Cir. 1991) (co-workers told "nigger jokes"; nicknamed plaintiff "Buckwheat"; teased plaintiff when he conversed with white women; hung black dummy from noose; wrote "KKK" and "All niggers must die" on bathroom walls; wrote "hi Bob KKK" on building; called plaintiff "nigger" and "dumb nigger")

Andrews v. City of Philadelphia, 895 F.2d 1475 (3d Cir. 1990) (supervisor objected, "Why don't you stay in one [office] like a man")

EEOC v. Beverage Canners, Inc., 897 F.2d 1067 (11th Cir. 1990) (supervisors made racially derogatory remarks and used epithets such as "niggers" and "swahilis"; asserted "blacks were meant to be slaves" and were of lower intelligence)

Wyerick v. Bayou Steel Corp., 887 F.2d 1271 (5th Cir. 1989) (plaintiff repeatedly referred to as a "Fucking bitch" on company radio)

Risinger v. Ohio Bureau of Workers' Compensation, 883 F.2d 475 (6th Cir. 1989) (racial slurs by eight supervisors or co-workers, such as "chink", "tight eye" and "damned foreigner")

EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989) (supervisor made numerous crude and disparaging remarks about pregnancy; stated he did not like "stupid women who have kids"; referred to plaintiffs as "dog" "whore" and "slut")

Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989) (numerous explicit racial remarks by supervisor)

Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) (repeated remarks to female surgery residents that women were not competent to be surgeons)

Davis v. Monsanto Chemical Co., 858 F.2d 345 (6th Cir. 1988) (racial slurs)

Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900 (11th Cir. 1988) (plaintiff called "bitch" and "whore")

North v. Madison Area Ass'n for Retarded Citizens, 844 F.2d 401 (7th Cir. 1988) (racial slurs)

Hall v. Gus Construction Co., Inc., 842 F.2d 1010 (8th Cir. 1988) ("blond bitch" written on outside of plaintiff's car; plaintiffs referred to repeatedly as "Fucking Flag girls")

Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987) ("niggers"; "coons"; "lazy niggers and Mexicans")

Nazaire v. Trans World Airlines, Inc., 807 F.2d 1372 (7th Cir. 1986) ("monkey")

Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986) (supervisor stated regarding plaintiff's position, "we really need a man in that job"; co-worker routinely used anti-female obscenities)

Hunter v. Alls-Chalmers Corp., Engine Div., 797 F.2d 1417 (7th Cir. 1988) (bulletin board graffiti such as "the KKK is not dead, nigger"; and "open season on coons"; racially derogatory notes such as "save this mess for the nigger")

- Hamilton v. Rodgers, 791 F.2d 439 (5th Cir. 1986) (racial slurs)
- Snell v. Suffolk County, 782 F.2d 1094 (2d Cir. 1986) ("nigger", "coon", "spic", "black bitch"; numerous racially derogatory literature and cartoons)
- Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250 (6th Cir. 1985) ("wetback"; "tomato picker"; plaintiff told to go back to Mexico so that a white person could have his job; "hot headed Mexican")
- Craik v. Minnesota State University Board, 731 F.2d 465 (8th Cir. 1984) (male faculty members objected to woman teaching statistics; student told women should just be para-professionals, and did not need graduate degrees; "we'll be stuck with a woman")
- Gilbert v. City of Little Rock, 722 F.2d 1390 (8th Cir. 1983) (racial remarks and derogatory epithets; racial oriented graffiti; racial cartoon on police headquarters bulletin board)
- Vaughn v. Pool Offshore Co., 683 F.2d 922 (5th Cir. 1982) ("nigger"; "coon"; "blackboy"; "That's just like a nigger"; "KKK Headquarters" written on facade of tool shed)
- Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1980) (numerous racial slurs, epithets and jokes; "niggers"; "spooks"; "uppity nigger"; "boy"; "Let's go finish the niggers"; announced KKK member hung hangman's noose; joke ending with the punch line, "Oh, don't worry about it, we're just barbecuing a few niggers")
- DeGrace v. Rumsfield, 614 F.2d 796 (1st Cir. 1980) (series of threatening notes, such as "hey boy get your Black ass out Before you don't have one")

- Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978) (epithets such as "niggers", "nigras", and "spear chucks"; black section of city referred to as the "Congo"; statements that black firefighters are not competent; hog trough set in front of black firefighter at dinner)
- Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir. 1977) ("dago")

Appendix D
Sexual Harassment

Burns v. McGregor Electronic Industries, Inc., 955 F.2d 559 (8th Cir. 1992) (supervisor remarked "have you been playing with yourself"; discussed sex; asked plaintiff to watch pornographic movies; made lewd gestures, such as imitating masturbation; asked for dates at least weekly; proposed oral sex so plaintiff would "be able to perform [her] work better"; proposed plaintiff pose nude for him in return for overtime pay; co-worker called plaintiff obscene names)

Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) (bizarre messages from co-worker referring to non-existent romantic relationship)

Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990) (plaintiffs called obscene names; display of pornographic pictures in locker room shared by male and female officers; supervisor breathed heavily down plaintiff's neck; pornographic pictures placed on office walls and in plaintiff's desk; sexual devices placed in plaintiff's desk; anonymous obscene phone calls)

Carrero v. New York City Housing Authority, 890 F.2d 569 (2d Cir. 1989) (co-worker dropped pants in front of plaintiff; supervisor repeatedly kissed plaintiff's neck, stroked her arm and knee)

Wyerick v. Bayou Steel Corp., 887 F.2d 1271 (5th Cir. 1989) (repeated references to plaintiff's breasts; supervisor stated he "had gotten a 'hard-on' watching her; obscene jokes on company radio)

EEOC v. Hacienda Hotel, 881 F.2d 1504 (8th Cir. 1989) (supervisor comments about plaintiff's "ass"; reference to oral sex; suggestion of sodomy; offer of money if plaintiff would "give him [her] body")

Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989) (numerous explicit sexual remarks by supervisor; supervisor showed plaintiff pornographic photograph of interracial sodomy, commenting plaintiff was hired for that purpose; supervisor showed plaintiff racist pornographic picture involving bestiality, threatening that was how plaintiff "was going to end up")

Paroline v. Unysis Corp., 879 F.2d 100 (4th Cir. 1989) (numerous sexual comments and unwanted touching of female employees by supervisor and other men; supervisor repeatedly kissed plaintiff over her objections)

Wheeler v. Southland Corp., 875 F.2d 1246 (6th Cir. 1946) (supervisor repeatedly leaned against plaintiff, touched her hips, called her "honey" or "baby"; asked why she did not hire women with big breasts)

Staton v. Maries County, 868 F.2d 996 (8th Cir. 1989) (numerous sexual advances; rape)

Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311 (11th Cir. 1989) (numerous sexual jokes; requests for sexual favors; proposal that plaintiffs visit supervisor on his couch; "suggestive" comments on plaintiffs' attire)

Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) (explicit discussion of desire to have sex; *Playboy* centerfolds and sexually explicit drawing of plaintiff posted in meeting room; sexual nicknames for women residents; explicit remarks about bodies of

plaintiff and other women; bragging about sexual exploits)

Bennett v. Corron & Black Corp., 845 F.2d 104 (5th Cir. 1988) (cartoons posted in public men's room depicting plaintiff, and bearing her name, engaged in crude and deviant sexual activity)

Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900 (11th Cir. 1988) ("we're going to take your clothes off to see if you are real")

Hall v. Gus Construction Co., Inc., 842 F.2d 1010 (8th Cir. 1986) (plaintiffs repeatedly asked by co-workers if they "wanted to fuck" or engage in oral sex; co-workers grabbed breasts or rubbed thighs of plaintiffs; co-workers mooned or exposed themselves to plaintiffs; flashed at plaintiffs obscene photographs)

Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987) (supervisor grabbed plaintiff's thigh; supervisor touched plaintiff's buttocks, stating "I'm going to get you yet"; supervisor grabbed plaintiff's breasts, stating "I got you")

Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554 (11th Cir. 1987) (facility manager repeatedly touched plaintiffs shoulders and hair; inquired if she could become pregnant; made remark described by district court as "too sexually explicit" to repeat)

Swentek v. USAir, Inc., 830 F.2d 552 (4th Cir. 1987) (co-worker allegedly grabbed plaintiff's genitals; repeatedly made sexually explicit and other obscene remarks to her; exposed himself to her; responded to plaintiff's objections by warning "I haven't even started on you yet")

Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307 (5th Cir. 1987) (co-worker touched plaintiff's hips and breasts; dropped his pants; stated "Let's get naked and go to my room")

Yates v. Avco Corporation, 819 F.2d 630 (6th Cir. 1987) (supervisor repeatedly proposed sexual relations, made sexually suggestive comments, lewd references to plaintiff's body, and lewd jokes; asserted he was putting plaintiff "on his mistress list"; asked plaintiff into his office so he could watch her walk out and "make groaning sounds")

Highlander v. K.F.C. National Management Co., 805 F.2d 644 (6th Cir. 1988) (supervisor touched plaintiff's legs and buttocks)

Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1985) (fellow employee remarked of plaintiff, "All that bitch needs is a good lay")

Bohen v. City of East Chicago, Ind., 799 F.2d 1150 (7th Cir. 1986) (supervisor grabbed plaintiff's crotch; repeatedly discussed his sexual tastes and expectations of her; rubbed his pelvis against her buttocks; co-workers directed obscene comments at plaintiff; another supervisor informed plaintiff that she should be forcibly raped)

Scott v. Sears, Roebuck & Co., 798 F.2d 210 (7th Cir. 1986) (co-workers slapped plaintiff's buttocks; commented she must "moan and groan" while having sex; supervisor repeatedly suggested he give plaintiff rubdown; responded to requests for assistance, "What will I get for it?")

Jones v. Flagship International, 793 F.2d 714 (5th Cir. 1988) (supervisor proposed to take plaintiff to a hotel because she needed the "comfort of a man"; numerous other advances; corporate vice-president rebuked plaintiff when she expressed distaste of female employees at use of figures of bare-breasted mermaids as table decorations)

McKinney v. Dole, 765 F.2d 1129 (D.C.Cir. 1985) (supervisor asked for sexual favors, rubbed himself against her, exposed himself)

Horn v. Duke Homes, Div. of Windsor Mobile Homes, 755 F.2d 599 (7th Cir. 1985) (supervisor made repeated sexual advances, made lewd comments and obscene gestures, brushed against breasts of female workers)

Barrett v. Omaha National Bank, 726 F.2d 424 (8th Cir. 1984) (supervisor talked about sexual activity; touched plaintiff in an offensive manner)

Phillips v. Smalley Maintenance Services, Inc., 711 F.2d 1524 (11th Cir. 1983) (supervisor repeatedly demanded sexual relations, discussed particular types of sexual activities)

Katz v. Dove, 709 F.2d 251 (4th Cir. 1983) ("extremely vulgar and offensive sexually explicit epithets")

Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (chief of police subjected female subordinates to repeated requests for sexual relations, vulgar comments, and sexual inquiries)

Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) (supervisors repeatedly sought sexual relationships; asked about sexual proclivities; "any man in his right mind would want to rape you")

Appendix E

Quid Pro Quo Sexual Demands

Burns v. McGregor Electronic Industries, Inc., 955 F.2d 559 (8th Cir. 1992) (supervisor whose advances had been rejected warned plaintiff, "You must not need your job very bad"; supervisor warned plaintiff he would let other employees force her dismissal "If you don't go out with me")

EEOC v. Hacienda Hotel, 881 F.2d 1504 (8th Cir. 1989) (threat of dismissal if sexual advances rejected; promise of immunity from dismissal if plaintiff would have sex with him)

Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) (female residents warned to obtain protection of senior residents by providing sexual favors)

Jordan v. Clark, 847 F.2d 1368 (8th Cir. 1988) (supervisor suggested plaintiff sleep with him in order to keep her job and get a promotion)

Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900 (11th Cir. 1988) (plaintiff warned co-workers would obstruct her sales efforts if she did not go out with them)

Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554 (11th Cir. 1987) (facility manager whose sexual advances were not accepted threatened "your fate is in my hands" and "revenge is the name of the game")

Highlander v. K.F.C. National Management Co., 805 F.2d 644 (6th Cir. 1986) (supervisor told plaintiff if she was interested in becoming a manager "there is a motel across the street")

Horn v. Duke Homes, Div. of Windsor Mobile Homes, 755 F.2d 599 (7th Cir. 1985) (supervisor told plaintiff it would be "easy" for her at office if she went out with him; supervisor promised raise if female employee would "cooperate" with him)

Lucas v. Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984) (plaintiff fired for refusing to have sexual relations with her foreman)

Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (3d Cir. 1983) (plaintiff fired for refusing to have sexual relations with supervisor)

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Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979) (plaintiff fired for refusing to have sexual relations with supervisor)

Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3rd Cir. 1977) (plaintiff warned by male supervisor that she would be fired unless she engaged in sexual relations)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TERESA HARRIS,
Petitioner,
v.

FORKLIFT SYSTEMS, INC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

**BRIEF FOR AMICUS CURIAE
AMERICAN PSYCHOLOGICAL ASSOCIATION
IN SUPPORT OF NEITHER PARTY**

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BRIEF FOR AMICUS CURIAE
AMERICAN PSYCHOLOGICAL ASSOCIATION
IN SUPPORT OF NEITHER PARTY

INTEREST OF AMICUS CURIAE ¹

The American Psychological Association ("APA"), a voluntary, nonprofit, scientific, and professional organization founded in 1892, is the major association of psychologists in the United States. APA has more than 114,000 members and includes the vast majority of psychologists holding doctoral degrees from accredited universities in this country. APA's major purposes are to promote psychological research, to improve research meth-

¹ The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court.

ARGUMENT

- I. **THE PREVAILING CONCEPT OF A "HOSTILE WORK ENVIRONMENT" MUST BE RE-EXAMINED IN ORDER TO AVOID SUBSTANTIAL DETRIMENT TO IMPORTANT FIRST AMENDMENT INTERESTS, BY RESTORING AS THE PROPER FOCUS OF THAT THEORY THE NOTION OF DISCRIMINATORY HARASSMENT.**

This case presents the Court with an overdue opportunity to re-examine the Title VII "hostile work environment" cause of action, which has become a morass of doctrinal confusion as the lower courts have increasingly strayed from the statute's essential focus on combatting discrimination. The courts' failure thus far to address the endemic free speech problems with this Title VII theory is particularly troubling, and unnecessary because the interests of free speech and combatting discrimination in the workplace are eminently reconcilable under a properly-crafted standard for Title VII liability.

The standard which most sensibly harmonizes these interests, and which should apply equally to claims based on gender-based and racially

motivated harassment, is the following: in order to establish Title VII liability on hostile work environment grounds, a plaintiff must demonstrate a pattern or practice of conduct or expression which targets the plaintiff employee(s), which a reasonable person would experience as harassment, and which has substantially hindered the plaintiff's job performance. Expression which would otherwise be protected by the First Amendment, i.e., expressing racially or gender-biased opinions, or the mere display or possession of "offensive" materials, should not be actionable without an additional showing of discriminatory intent to harass women or minority workers. (Indeed, as argued further below, the additional element of intent to harass would justify treating the speech or expression as harassment, removing it from the sphere of First Amendment protection.)

Unfortunately, many courts deciding cases under this Title VII theory have ignored the First Amendment interests at stake. Because the courts have applied vague and subjective standards for "harassment," the threat of

hostile work environment liability causes employers to over-regulate what is fairly regarded as protected expression rather than harassment. Worse still, in fashioning remedies in hostile work environment cases, the courts have actually begun to order employers to prohibit even discreet private possession of any materials with sexual content, thus imposing a direct prior restraint on protected expression and materials. See, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1541-1543 (M.D. Fla. 1991), appeal pending (11th Cir. No. 91-2635). As so applied, Title VII egregiously violates the First Amendment due to overbreadth and viewpoint discrimination, and as a prior restraint on protected expression.

The facts of present case do not directly implicate the more extreme free speech concerns which have come prominently to the fore in recent cases such as *Jacksonville Shipyards*, because the conduct Ms. Harris alleges to have created a hostile work environment all falls within the category of targeted, abusive behavior which under a proper objective standard

might well be determined to constitute harassment rather than expression protected by the First Amendment. This case does, however, illustrate the central conceptual problems which have diverted the courts from an appropriate Title VII focus on invidious harassment. For the most part, the courts have relied on inappropriately subjective standards for discerning actionable harassment, either facilely equating mere "offensiveness" with harassment, or, as in this case, requiring that the plaintiff demonstrate serious psychological harm before conduct becomes actionable. This focus on the plaintiff's subjective reactions to various types of workplace conduct or speech has distracted the courts from a proper emphasis on the objective inquiry as to whether the complained-of behavior is in fact reasonably regarded as harassment, blurring necessary distinctions between conduct or expression that targets an employee for abuse, and protected expression that does not.

These subjective standards are either overbroad in violation of the First Amendment --

creating liability for protected speech not fairly viewed as harassment, merely on grounds of its asserted "offensiveness" -- and/or under-protective of Title VII interests. Holding plaintiffs such as Ms. Harris to an unrealistic and unfairly high standard of proving serious psychological harm, regardless of whether invidious harassment in fact impeded her job performance, may also impose liability for protected speech, based on the plaintiff's subjective reactions. Thus the current standards are both blind to important First Amendment concerns and inadequate to the statutory purpose of combatting workplace discrimination.

"Title VII is not a 'clean language act,'" as some courts and commentators have wisely noted. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 Ohio St. L.J. 481, 492 (1991), quoting *Katz v. Dole*, 709, F.2d 251, 156 (4th Cir. 1983). Its purpose is to eradicate workplace discrimination, including invidious harassment on the basis of race or gender.

Judicial attempts to expand its focus to sanitize the workplace of all "offensiveness" or sexuality yield unconstitutionally censorial results. Under the wide-ranging approach to Title VII liability which has emerged in the reported decisions, courts and employers are imposing restrictions designed to "reduce the adult population to reading only what is fit for children," an unconstitutional result this Court has condemned at least since *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

Moreover, such efforts are in fact counter-productive in terms of the statutory goal of gender equality. The paternalistic project of sanitizing workplace speech in defense of women workers enshrines archaic stereotypes of women as delicate, asexual creatures who require special protection from mere words and images. It may very well create additional antagonisms toward women whose entry into male-dominated professions is perceived as occasioning unwarranted intrusions into the sphere of personal liberty. Also, such overbroad regulations of speech threaten not only to

censor the speech of the swearing male dockworker, but to curtail the free speech of the woman who chooses to read *Playgirl* on her lunch break or to display a pro-choice poster which might offend co-workers on religious grounds.

As applied in most recent decisions, hostile work environment theory has gone fundamentally awry in relation to both the statutory purpose and First Amendment limitations. It is overbroad, creates viewpoint discrimination regarding racial and gender issues, and has been taken to authorize blatant judicial prior restraints on workers' protected speech and access to protected materials. These problems are avoidable by mooring the hostile work environment theory to its proper foundations of actual discriminatory harassment, and FFE respectfully urges this Court to do so by drawing the principled distinction between such harassment and protected expression.

- A. Women deserve Title VII protection from gender-based harassment, but neither need nor ultimately benefit from misguided attempts to rid the workplace of all expression regarding sexuality.

As feminists dedicated to both advancing equality in the workplace and preserving free speech rights, FFE is particularly concerned about the diversionary and counter-productive focus on sexual speech in hostile work environment cases. Semantic confusion has given rise to doctrinal confusion as the concept of "sexual harassment" has often been defined exclusively in terms of sexual conduct or speech, rather than as harassment motivated by gender bias, whatever its particular content. Because the current emphasis on sexual behavior under the EEOC guidelines is unduly narrow and misleading, FFE urges this Court to clarify that Title VII protects women from gender-based harassment, not just harassment that takes a sexual form, as well as to limit the concept of harassment so as to exclude protected speech.

Title VII provides a statutory basis for combatting employment discrimination, providing

that it is an unlawful employment practice for an employee "to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000(e)-2(a)(1). The courts have recognized two types of "sexual harassment" as constituting actionable discrimination under this provision: "quid pro quo" harassment, which typically involves a supervisor's demands for sexual favors and which is not at issue in this case, and "hostile work environment" harassment of the sort at issue here. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66, 73 (1986), a case which involved both types of sexual or gender-based harassment, this Court held that such "hostile environment" discrimination was actionable under Title VII.

Vinson involved sexual harassment in the "purest" sense, and did not raise any free speech concerns whatsoever. The plaintiff in *Vinson* alleged that her supervisor demanded sexual favors and that she acquiesced for fear

of losing her job, that he fondled her in the workplace in front of other employees, exposed himself to her, and forcibly raped her. 477 U.S. at 62. This Court concluded that such sexual harassment constitutes gender-based discrimination regardless of whether the resulting injury is economic or psychological. *Id.* at 64. In the context of the *Vinson* facts, the Court endorsed the EEOC guidelines which define "sexual harassment" to include "verbal or physical conduct of a sexual nature [that] has the purpose or effect of unreasonably interfering with an individual's job performance or creating an intimidating, hostile or offensive work environment." 29 C.F.R. § 1604.11(a)(3); see *Vinson*, 477 U.S. at 65.

Although these EEOC Guidelines make some sense in relation to the factual scenario *Vinson* represents, their lack of clarity regarding the concept of harassment has created a wellspring of confusion to the detriment of any comprehensive hostile work environment theory. First, these guidelines are both under-inclusive and misleading in their one-sided definition of

actionable harassment as involving behavior "of a sexual nature," instead of defining the offense as *gender-based* harassment regardless of whether the abuse is sexual in nature. Second, as discussed further below (see Section I.B.), the definition of sexual harassment to include any "verbal conduct" that creates an "offensive" work environment is egregiously overbroad and viewpoint discriminatory in its application to protected expression, and must be narrowed to comport with the First Amendment.

As the present case illustrates, a wide range of abusive behavior, such as habitually referring to women employees as "stupid" or "incompetent," may constitute *gender-based* harassment of the sort this Court considered actionable discrimination under Title VII where "sufficiently severe or pervasive 'to alter the conditions of . . . employment.'" *Vinson*, 477 U.S. at 67. Although the EEOC's definition of "sexual harassment" is to some extent understandable because of the prevalence of claims involving actual sexual conduct, it also creates confusion due to the double meaning of

"sexual" to denote both gender and sexuality. Accordingly, some courts have acknowledged that the harassment need not be "of a sexual nature," notwithstanding the EEOC definition. See, e.g., *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3rd Cir. 1990); *Bell v. Cracklin Good Bakers, Inc.*, 777 F.2d 1497, 1503 (11th Cir. 1985); *McKinney v. Dole*, 765 F.2d 1129, 1140 (D.C. Cir. 1985). Unfortunately, however, the one-sided emphasis on sexuality as the essence of what should be defined as gender-based discrimination has eclipsed the essential concept of *harassment*, prompting some courts to construct a facile equation to the effect that sexual speech = offensiveness = harassment. See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991).

This approach focusing primarily on sexuality rather than gender-based discrimination fundamentally disservices women by perpetuating stereotypes that women are so delicate in their sensibilities that exposure to erotic materials, frank sexual discussion, or jokes will inherently intimidate and demoralize

jokes will inherently intimidate and demoralize them. "The assumption that women as a group may be more offended by profanity than men as a group seems like just the sort of stereotype that Title VII was intended to erase." Browne, *supra*, at 488.

This paternalistic approach is also harmful to both men and women workers because it is increasingly spawning court orders and employer regulations censoring virtually any sexual expression, including possession of protected materials as innocuous as *Cosmopolitan* and calendars featuring swimsuit-clad models. In the *Jacksonville Shipyards* case, for example, the district court has ordered the employer to prohibit a humorously broad array of protected materials, extending to any "sexually suggestive" reading materials and any depiction "of a person of either sex who is not fully clothed or in clothes that are not suited to or ordinarily accepted for the accomplishment of routine work in and around the shipyard and who is posed for the obvious purpose of displaying

or drawing attention to private portions of his or her body." 760 F. Supp. at 1542.

Coupled with the courts' failure to narrow the concept of "harassment" appropriately, this undue and apparently growing emphasis on cleansing the workplace of all sexual expression adversely affects all workers by occasioning such gratuitous infringement of their First Amendment rights. Undoubtedly, this over-regulation also generates hostility on the part of male workers who conclude that women's entry into the workplace has occasioned this diminution of their personal freedoms. For these reasons, the anti-sexual assumptions increasingly embedded in hostile work environment cases are not only offensively paternalistic but also probably as counter-productive to the pursuit of equality as they are destructive of free speech rights.

It is therefore crucial that this Court clarify that the gravamen of the Title VII theory is not sexuality or offensiveness but rather *gender-based discrimination*, whatever form the complained-of harassment may take. By

returning this theory to its proper basis of liability for discriminatory harassment, and by distinguishing harassment from protected speech, this Court would both effectuate the statutory purpose and avoid an unnecessary clash between that purpose and First Amendment rights.

- B. Under current law, the failure to distinguish harassment from protected speech renders Title VII overbroad and viewpoint discriminatory, violating the First Amendment rights of all workers including important free speech rights of women.

The caselaw regarding hostile work environment liability reveals an alarming failure to limit the definition of "harassment" so as to exclude protected First Amendment activities. Because the courts have increasingly applied an extremely vague, subjective concept of harassment in many of these cases, sometimes resting liability on "offensive" expression such as Penthouse centerfolds and sexual or sexist jokes, employers are compelled to restrict such speech in order to avoid liability.

1988), employers are compelled to restrict such speech in order to avoid liability.

A broad definition of sexual and racial harassment necessarily delegates broad powers to courts to determine matters of taste and humor, and the vagueness of the definition of 'harassment' leaves those subject to regulation without clear notice of what is permitted and what is forbidden. The inescapable result is a substantial chilling effect on expression. Holding employers liable for the offensive speech of their employees . . . creates a powerful incentive for employers . . . to censor the speech of their employees. Employers have responded to these incentives by substantially overregulating the speech of their employees.

Browne, *supra*, at 483.

Some courts, notably the district court in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), have gone so far as to order employers to impose prohibitions extending even to mere private possession of protected reading materials. These restrictions, and the theory of liability on which they depend, are patently overbroad. They are also often viewpoint discriminatory, much like the anti-pornography ordinance invalidated in *American Booksellers Association v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd* 475 U.S.

1001 (1986), and the restrictions on "hate speech" in *R.A.V. v. City of St. Paul*, ___ U.S. ___, 112 S. Ct. 2538 (1992).² In cases of court-ordered restrictions of employees' protected expressive activities, Title VII has become the premise for outright prior restraints which cannot survive the extremely strict First Amendment scrutiny such restraints require under *Near v. Minnesota*, 283 U.S. 697 (1931), and its progeny.

Imposing liability for protected expression renders this Title VII theory unconstitutionally overbroad; yet numerous reported decisions involve various forms of protected speech found to constitute or contribute to a hostile work environment for women and minorities. This development is both unfortunate and unnecessary, because protected speech can easily be filtered

² Although the majority in *R.A.V.* noted that "sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices," 112 S. Ct. at 2546, the Court clearly was referring to liability on the basis of unprotected expression, not speech that is protected by the First Amendment because not fairly deemed to be harassment for purposes of Title VII.

out simply by defining "harassment" in objective terms, as that word is commonly understood, limiting the concept to a course of conduct or expression targeting the plaintiff for invidious abuse, and which a reasonable person would regard as harassment.

Such harassing insults and other verbal abuse targeting individuals do not constitute protected speech because they directly effectuate the unlawful end of employment discrimination and are thus properly regarded as discrimination or harassment rather than as any real part of the marketplace of ideas. See *Pittsburgh Press v. Human Relations Commission*, 413 U.S. 376, 388 (1975). Similarly, in *Frisby v. Schultz*, 487 U.S. 474, 486 (1988), this Court upheld an ordinance that restricted picketing targeting a particular residence, where the basic intent was not "to disseminate a message to the general public but to intrude upon the targeted resident, and to do so in an especially offensive way." The Court deemed such intimidation and invasion of privacy to be

"fundamentally different from more generally directed . . . communication." *Id.*

Similarly, there is a great need for this Court to distinguish harassment from "more generally directed communication," to avoid unconstitutional applications of the hostile work environment theory. A prime example of the misuse of this cause of action is *Jacksonville Shipyards*, currently pending before the Eleventh Circuit. Although the plaintiff in that case alleged a great deal of abusive, gender-biased behavior targeted at her individually, the court strongly emphasized the presence of pornography in the workplace, sexually-oriented jokes, and similar expression not directed at the plaintiff as at least the partial basis for imposing liability.³ See 760 F. Supp. at 1494-1498, 1513, 1524.

On this basis, the court fashioned an incredibly broad remedial order, requiring the

³ To impose liability based even in part upon protected expression would violate the First Amendment; see, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

employer as noted above to prohibit its workers from engaging in a wide variety of protected expressive activities, including "reading . . . in the work environment materials that are in any way sexually revealing [or] sexually suggestive," and displaying pictures" of a person of either sex who is not fully clothed or in clothes that are not suited to or ordinarily accepted for the accomplishment of routine work in and around the shipyard and who is posed for the obvious purpose of displaying or drawing attention to private portions of his or her body." 760 F. Supp. at 1542. The overbreadth of this remedy, and the prior restraint it imposes on protected expression, egregiously violate the First Amendment.

Often, such restrictions are viewpoint-discriminatory as well. For example, they may prohibit expressions of opinion that women do not belong in the workplace, while allowing the contrary view to be expressed freely. Cf. *Jacksonville Shipyards*, 760 F. Supp. at 1526, with *American Booksellers Association v. Hudnut*,

771 F.2d 323 (7th Cir. 1985), *aff'd* 475 U.S. 1001 (1986).

Nor can liability on the basis of such protected, non-targeted expression be characterized as a "time, place or manner," restriction, because it is purely a content regulation on grounds of "offensiveness." Cf. *Boos v. Barry*, 485 U.S. 312, 321-322 (1988) ("Regulations that focus on the direct impact of speech on its audience" are content-based; the "emotive impact of speech on its audience is not a 'secondary effect.'").

Accordingly, the overbreadth of the emerging Title VII-inspired regulation of protected speech on the basis of its content cannot be justified and requires a narrowing of hostile work environment theory.

II. PETITIONER CORRECTLY ASSERTS THAT THE COURTS BELOW ERRED IN REQUIRING THAT TITLE VII PLAINTIFFS DEMONSTRATE SERIOUS PSYCHOLOGICAL HARM IN ORDER TO PREVAIL IN A HOSTILE WORK ENVIRONMENT ACTION.

Petitioner Harris correctly asserts that the standard under which the lower courts have

evaluated her hostile work environment claim, employing the test the Sixth Circuit adopted in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986),⁴ and requiring her to demonstrate previous psychological harm as an element of her claim, is contrary to this Court's approach and to the statutory purpose of Title VII. Requiring Title VII plaintiffs to prove such psychological harm as a predicate to establishing actionable harassment is an unduly subjective test which does not comport with the statute's more general prohibition against any discrimination which affects a term or condition of employment. However, because neither this "severe psychological harm" standard nor Petitioner's proposed alternative standard of "offensiveness" strikes an appropriate balance by including an objective standard that filters out protected expression from unprotected

⁴ The Eleventh Circuit in *Brooms v. Regal Tube*, 830 F.2d 1554 (11th Cir. 1987), and the Second Circuit in *Scott v. Sears Roebuck*, 798 F.2d 210 (7th Cir. 1986), have also adopted at least a modified version of this test.

harassment as the potential basis for liability, both of these tests should be rejected.

From a Title VII perspective, requiring a plaintiff to demonstrate serious psychological harm in order to prove discriminatory harassment is unfair and under-protective in relation to the statutory purpose. Clearly, the statute contemplates a remedy where the plaintiff proves discrimination which "unreasonably interfer[es] with [his or her] work performance," as this Court held in *Vinson*, 477 U.S. at 65. Discriminatory harassment could certainly become intolerable so as to result in constructive discharge, as Petitioner has alleged, without causing a plaintiff serious psychological injury. Essentially, this test would preclude a claim by the employee whose mental health remains in tact despite discriminatory harassment which has driven him or her from the workplace.

From a First Amendment perspective, moreover, neither this "psychological harm" test nor the alternative standard of mere

"offensiveness" adopted by several other courts⁵ is constitutionally permissible. Both tests are unduly subjective, defining harassment by reference to subjective reactions to expression. Lacking an objective standard designed to separate out and protect expression not legitimately regarded as harassment because it does not target an individual or individuals for abuse, these tests cannot survive First Amendment scrutiny due to their overbreadth, vagueness, and resulting chilling effect on protected expression.

- A. Title VII liability should be imposed only for a pattern or practice of speech or conduct targeting a specific employee or employees, which a reasonable person would experience as harassment, and which has demonstrably hindered the employee in his or her job performance.

The standard FFE urges this Court to adopt, or some close variation on this theme, appears

⁵ See *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3rd Cir. 1990); *Burns v. McGregor Electronic Industries, Inc.*, 955 F.2d 559 (8th Cir. 1992); *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

to be the most logical and principled standard for distinguishing protected expression from harassment. By adopting such a test for hostile work environment cases, this Court could reconcile the statute's laudatory anti-discrimination goals with First Amendment protection for non-targeted, non-harassing speech. The central features of this test, which distinguish it from either of the standards the parties advocate in this case, are the requirement that the complained-of behavior target the plaintiff for insidious abuse, and the related objective requirement that a reasonable person in the circumstances would regard that behavior as harassment. These objective elements are consistent with the common understanding of the term "harassment," and exclude as a basis for liability non-targeted, generalized and therefore protected speech and media materials.

This test allows for a finding of Title VII liability for severe, persuasive, or repeated instances of targeted insult or abuse, and which have a demonstrable impact on the plaintiff's

job performance. This proposed standard would apply equally to cases of alleged gender and racial harassment; one token of the fact that this standard eschews the counter-productive gender-based stereotypes the courts have built into the subjective tests that have prevailed to date. Focusing on the targeted and abusive nature of the alleged harassment, this standard appropriately emphasizes the objective harm of discrimination at which the statute aims, rather than focusing on the relative delicacy of sensibilities of the woman plaintiff who must centrally show either "offense" or "psychological harm." The subjective approach removes focus from the alleged wrong-doers and inappropriately places it on the plaintiff, reinforcing stereotypes that women are psychologically delicate and need special solicitude.

Discrimination, not presumed female delicacy, should remain the essential focus of Title VII litigation. However biased and offensive expression which cannot fairly be deemed targeted, discriminatory harassment

cannot be the subject of governmental regulation under the aegis of Title VII.

B. Title VII cannot constitutionally create liability for expression protected by the First Amendment, e.g. mere display or possession of "offensive" materials, at least absent an additional showing of discriminatory intent to harass women or minorities.

The urge to censor "offensive" expression in pursuit of lofty goals is ever a strong force in our society,⁶ and one which has of late made itself increasingly felt in American culture.⁷ It is, however, an urge the First Amendment requires that we staunchly resist, in favor of the fundamental values of tolerance, pluralism, and the free exchange of ideas.

For all the reason noted above, non-targeted speech such as erotic posters, "Archie

⁶ See Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society -- From Anthony Comstock to 2 Live Crew*, 33 Wm. & Mary L. Rev. 741 (1992).

⁷ See Pally, *Sense and Censorship: The Vanity of Bonfires* (1991).

Bunker for President" buttons, or general expressions of biased opinion like, "Women don't belong in the legal profession," may not be censored merely on grounds that they are "offensive" to women or minorities. Although these modes of expression and the attitudes they represent may be (and hopefully are) noxious to a great many Americans, the First Amendment does not allow the government to suppress them either directly by court order or indirectly by imposing Title VII liability on employers.

Certainly, if what purported to be a generalized expression of opinion were shown to be intended as harassment, it might be deemed unprotected much like the stream of personalized racial incitement. For example, display of a Ku Klux Klan poster or continual remarks that women workers are incompetent, shown in the circumstances to be intended as threats or demoralizing taunts implicitly directed at black or women employees, might become actionable in an appropriate case. Absent such a showing, however, the generalized opinion or the "offensive" poster remains protected by the

First Amendment and may not form the basis for Title VII liability.

Any other approach trivializes the much more serious types of gender or racially-biased behavior which effectively discriminate against women and minorities. The standard suggested here protects against those forms of harassment, encouraging employers to regulate against targeted, harassing expressions of racial or gender animus while protecting employees' rights of free expression. It avoids spurious stereotypes that all women have delicate sensibilities and require protection from sexual imagery and off-color jokes. It entails an acknowledgement that the adult working public cannot, consistent with the First Amendment, be reduced to reading and viewing only that material which the most sensitive member of the work force would find inoffensive. Because the First Amendment requires no less, Amicus FFE respectfully urges this Court to adopt this objective standard and to exclude protected expression from the purview of Title VII liability.

CONCLUSION

For all the foregoing reasons, Amicus Curiae Feminists for Free Expression urges this Court to reverse the judgment below and to remand this case for reconsideration under the appropriate standard.

Respectfully submitted,

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No. _____

Supreme Court, U.S.

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IN THE
Supreme Court of the United States
October Term, 1992

TERESA HARRIS,

Petitioner,

V.

FORKLIFT SYSTEMS, INC.,

Respondent.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

BRIEF OF THE SOUTHERN STATES POLICE BENEVOLENT
ASSOCIATION AND THE NORTH CAROLINA POLICE
BENEVOLENT ASSOCIATION, AS AMICI CURIAE

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INTEREST OF THE AMICI CURIAE

The Southern States Police Benevolent Association (hereafter SSPBA) is a voluntary association of law enforcement officers and related public employees with over 30,000 members in ten southern states. The North Carolina Police Benevolent Association (NCPBA) is a state chapter of SSPBA. The SSPBA and NCPBA seek to promote and protect the rights of its members through legislative advocacy and litigation.

Members of Amici are frequently confronted with serious problems of sexual harassment like that of Petitioner Teresa Harris. Amici are therefore vitally interested in the outcome of this critical case. Amici have obtained the consent of both the Petitioner and the Respondent to file this brief, and have filed letters indicating consent with the clerk's office of this Court.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case as presented by the Petitioner.

ISSUE

Whether a Plaintiff in a sexual harassment case must prove that she or he suffered severe psychological injury in order to prevail on a claim brought pursuant to Title VII of the Civil Rights Act of 1964?

SUMMARY OF ARGUMENT

The Sixth Circuit opinion below has adopted an erroneous and unworkable standard of proof that is not authorized by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, its legislative history or prior decisions of this Court. The Sixth Circuit has erroneously incorporated and imposed a damage element of "severe psychological injury" into the Title VII liability analysis. The "pervasive and severe" requirement under this Court's hostile environment doctrine refers to the harasser's conduct, rather than the effect of that conduct on the victim's psychological

well-being. Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991). A workplace can be abusive and poisoned, and therefore violate Title VII, without resulting in severe psychological injury to each victim.

I. THIS COURT SHOULD REAFFIRM ITS HOLDING AND RATIONALE IN MERITOR SAVINGS BANK V. VINSON

This Court should reaffirm its rich heritage of protecting individual rights against invidious discrimination including sexual harassment in the workplace. In Meritor Savings Bank v. Vinson, 477 U.S. 57, 66 (1986), this Court's unanimous decision recognized the hostile environment liability theory¹ at issue in the case sub judice. In Vinson, this Court rejected the employer's assertion that Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, only proscribed "economic" or "tangible" discrimination. 477 U.S. at 64. Rather, the Court explained that Title VII contains a Congressional intent to "strike at the entire spectrum of disparate treatment of men and women in employment." Id., citing Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978). Vinson reasoned that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule and insult."

Vinson framed the "hostile or abusive work environment" test as follows:

For sex harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment. 477 U.S. at 67.²

¹ Vinson catalogs various hostile environment cases where liability has been found for such harassment premised upon race, religion and national origin. Vinson characterized the liability theory by explaining that Title VII proscribes "a hostile or abusive work environment. 477 U.S. at 66.

² The EEOC Guidelines define hostile environment sex harassment as "conduct [which] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. section 1604.11(a)(3). In Meritor, this Court recognized that courts may properly look to these EEOC Guidelines for guidance when determining hostile environment claims. 477 U.S. at 65.

There is no suggestion in Vinson that severe psychological injury or even any psychological injury must be present in order for a hostile environment claim to be actionable. Rather, the Vinson liability standard provides that the harassment must be "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." 477 U.S. at 67.

II. A SEX HARASSMENT VICTIM NEED NOT PROVE THAT SHE OR HE SUFFERED SEVERE PSYCHOLOGICAL INJURY IN ORDER TO PROVE SEX HARASSMENT

Sexual harassment has become an epidemic in the 1990s that presents a plethora of economic, social and personal problems for employees, families, businesses and in the public sector.³ Since Vinson, a number of lower court decisions have grappled with the plaguing problem of sexual harassment in our workplaces.

In Sparks v. Pilot Carrier, 830 F.2d 1554, 1561 (11th Cir. 1987), the Eleventh Circuit held that sex harassment was sufficiently persistent and severe to be actionable under the Vinson standard where the plaintiff was "frightened" and "upset." Scott v. Sears, 798 F.2d 210, 213 (7th Cir. 1986) framed the test as whether the conduct "caused such anxiety and debilitation to the Plaintiff that working conditions were poisoned..." Id. citing Bundy v. Jackson, 641 F.2d 934, 944 (D.C. Cir. 1981). In Bundy, the court explained:

What remains is the novel question whether the sexual harassment of the sort Bundy suffered amounted itself to sex discrimination with respect to the 'terms, conditions, or privileges of employment'...[W]e believe that an affirmative answer follows ineluctably from numerous cases finding Title VII violations where an employer created or condoned a substantially discrimina-

³ See, e.g., Shulman & Abernathy, The Law of Equal Employment Opportunity, section 5.06 (1990); McGuinness, Sexual Harassment Claims: Preliminary Investigation and Client Counseling, 10 Workplace Injury Reporter 157 (Dec. 1992); McGuinness & Wintjen, Counseling Victims of Sexual Harassment, Trial Lawyer Magazine, March, 1992 at 22.

tory work environment, regardless of whether the complaining employee lost any tangible job benefits as a result of the discrimination. Bundy's claim on this score is essentially that 'conditions of employment' include the psychological and emotional work environment -that the sexual stereotyped insults and demeaning propositions to which she was indisputably subjected and which caused anxiety and debilitation, ... illegally poisoned the environment. 641 F.2d at 943-44.

This emphasis placed on the psychological well being of the workplace and employees has been misread by the courts below to suggest that a Plaintiff must suffer severe psychological injury in order for a hostile environment claim to be actionable. The pervasive and severe requirement refers to the harasser's conduct, rather than the effect of that conduct on the victim's psychological well-being.

The courts below have adopted this "severe psychological injury" element from Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986). Rabidue imposes the further requirement that "the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile or offensive working environment that affected seriously the psychological well being of the plaintiff..." 805 F.2d at 619. This has the effect of placing an additional burden of proving psychological injury, even when under an objective standard the environment was hostile.

The Rabidue decision, which included a strong dissent, has been questioned in at least two subsequent Sixth Circuit decisions.⁴ As demonstrated in Petitioner's brief and infra, this new "severe psychological injury" element is not provided or warranted by Title VII or its legislative history. This standard is unworkable and places an onerous burden upon aggrieved victims of sex harassment who have been genuinely hurt by a hostile environment, but have not been clinically diagnosed with severe psychological injury. A work environment can be "poisoned" and "abusive" and therefore violate Title VII without result-

ing in severe psychological injury.

The Third, Eighth and Ninth Circuits have not required sex harassment victims to additionally prove severe psychological injury.⁵ The conclusion of the Magistrate judge below, which was adopted by the trial court and the Sixth Circuit, observed that the Respondent's conduct was not "so severe as to be expected to seriously affect plaintiff's psychological well being." As the Ninth Circuit explained in Ellison v. Brady, 924 F.2d 872, 878n.8 (9th Cir. 1991):

... perhaps the confusion in Scott and Rabidue flows from a quotation in Meritor from Rogers [6.] In its analysis, the Rogers court explained that [o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers. Meritor, 477 U.S. at 66, 106 S.Ct. at 2405, quoting Rogers, 454 F.2d at 238. The Rogers court did not hold that a hostile environment only exists when the emotional and psychological stability of workers is completely destroyed.

As the court in Ellison further reasoned, "[n]either Scott's search for 'anxiety and debilitation' sufficient to 'poison' a working environment nor Rabidue's requirement that a plaintiff's psychological well-being be 'seriously affected' follows directly from language in Meritor." 924 F.2d at 877-78. Consequently, Ellison instructs that the new "severe psychological injury" requirement in this case which was grounded in Rabidue is not premised upon this Court's decision and analysis in Meritor. In fact, this newly adopted "severe psychological injury" requirement is inconsistent with Meritor because it requires a substantially higher threshold of proof than this Court enunciated.

The pervasive and severe requirement refers to the harasser's conduct, rather than the effect of that conduct on the victim's psychological well-being. Ellison, 924 F.2d at 878. To require victims of sex harassment to tolerate abusive and harmful harassment until "severe psy-

⁴ See Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987); Davis v. Monsanto Chemical Corp., 858 F.2d 345, 358 (6th Cir. 1988). Cf. Ellison v. Brady, 924 F.2d 872, 877 (9th Cir. 1991).

⁵ See Andrews v. City of Philadelphia, 895 F.2d 1469 (3rd Cir. 1990); Burns v. McGregor, 955 F.2d 559 (8th Cir. 1992); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

⁶ Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).

chological injury" has materialized or been diagnosed will serve to further damage victims by perpetuating and exacerbating the injuries. This is not required. See EEOC Policy Guidance On Sexual Harassment, 8 Fair Employment Practices Manual (BNA) 405: 6681, 6690, n. 20 (March 19, 1990). (Severe psychological harm need not be shown).

Tort and personal injury principles do not require victims to sit idly by until they are psychologically wrecked before seeking judicial relief. The adoption of the Rabidue standard would require sex harassment victims to endure sexual harassment to the point of severe psychological injury in exchange for the privilege of working. This would undermine and render useless the Title VII objective of removing sexual harassment from the workplace. The decisions below directly frustrate this nation's deep commitment to eradicating sexual harassment from the workplace.⁷

The facts in the case sub judice present a flagrant and protracted pattern of malicious sexually oriented taunting, teasing and outright sexual propositioning sufficient to frighten a reasonable person and render the workplace abusive and intimidating.⁸ In fact, the Magistrate below found the conduct to be offensive to a reasonable person.⁹

⁷ While Amici contend that Ellison's analysis rejecting the "severe psychological injury" requirement is sound, Amici submit that the "reasonable woman standard" adopted in Ellison is inappropriate. Amici would propose a gender neutral standard, therefore assessing the conduct in question by inquiring as to whether reasonable prudent person would be offended by the alleged hostile environment. Although this issue does not appear to be squarely before the Court, the better approach appears to be to examine the issue of unwelcomeness from that of both the harasser and the victim. See, e.g., Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988). A totality of the circumstances approach would also better determine whether sex harassment is sufficiently severe, pervasive and unwelcome.

⁸ Types of actionable hostile environment sexual harassment are cataloged in Omillian & Kamp, Sex Based Employment Discrimination section 22.08 at 18 (1990). The facts of this case, recited in Petitioner's brief and found by the Magistrate, are substantially more egregious than in numerous cases that have found Title VII liability. The conduct here was intense and repetitive, and was far more than an isolated incident.

⁹ There is ample evidence in the record to demonstrate the extremely offensive nature of the employer's conduct and the brutal impact upon the Petitioner. Amici further contend that the lower courts erred in the constructive discharge analysis. Amici adopt the Petitioner's arguments addressing constructive discharge. Petitioner's workplace had become dangerously offensive. Any reasonable employee would have fled the workplace for her own safety.

CONCLUSION

"In the workplace, we wage our most important battles, with poor weapons and few rights, and then, like the slaves of old, many are irretrievably trapped and there many grind away their lives in drudgery and despair." Spence, With Justice For None 162 (1989).

WHEREFORE, Amici respectfully urges this Court to reverse the judgment and decision below and to remand this case for a new trial.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TERESA HARRIS,
Petitioner,
v.

FORKLIFT SYSTEMS, INC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

**BRIEF AMICUS CURIAE OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL
IN SUPPORT OF RESPONDENT**

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

No. 92-1168

TERESA HARRIS,
v. *Petitioner,*
FORKLIFT SYSTEMS, INC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

**BRIEF AMICUS CURIAE OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL
IN SUPPORT OF RESPONDENT**

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*. The written consents of both parties have been provided herewith to the Clerk of this Court. The brief urges this Court to affirm the decision below, and thus supports the position of Respondent Forklift Systems, Inc.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council ("EEAC" or "Council") is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of employment dis-

crimination. Its membership includes over 270 major U.S. corporations, as well as several associations which themselves have hundreds of corporate members. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of non-discrimination and equal employment opportunity.

All of EEAC's members, and the constituents of its association members, are subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Title VII) as well as other equal employment statutes and regulations. As employers, EEAC's members and member constituencies have a strong interest in maintaining workplaces that are free from sexual harassment. As potential respondents to Title VII charges and other employment-related claims, EEAC's members are interested in when conduct is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment,'" *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)), so as to be actionable sexual harassment under Title VII.

Pursuant to this Court's guidance in *Meritor*, EEAC's members have instituted preventative measures designed to discourage sexual harassment, which include: adoption of policies expressly forbidding supervisors and employees to engage in sexually harassing conduct; publication of employee manuals

and posting of notices to inform employees of their rights; and training supervisors to recognize and halt harassment in the workplace. In addition, many members have implemented formal anti-harassment procedures whereby an aggrieved employee can seek redress from higher management authorities, or even bring an internal complaint against a co-worker or supervisor who has engaged in harassment in the workplace. These policies call for prompt and effective remedial action by the employer, including discipline and, where appropriate, discharge of the offender.

Thus, the issue presented in the petition is extremely important to the nationwide constituency that EEAC represents. The district court concluded, and the Sixth Circuit affirmed, that while the conduct in question was offensive and sexual in nature, it did not meet the threshold of "hostile environment" sexual harassment sufficient to violate Title VII. Petitioner contends that an inaccurate standard was used, and in effect asks this Court to elaborate on the principles set forth in *Meritor*.

Because of its interest in the nation's civil rights laws, EEAC has, since its founding in 1976, filed briefs as *amicus curiae* in cases before this Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this *amicus* activity, EEAC participated as *amicus curiae* in *Meritor*. In addition, EEAC has filed briefs in a number of other cases involving sexual harassment issues.¹

¹ See, e.g., *Chrysler Corp. v. International Union, Allied Indus. Workers of Am.*, AFL-CIO, cert. denied, 113 S. Ct. 304 (1992) (petition seeking review of lower court decision upholding arbitration award reinstating an employee terminated

psychological well-being." *Id.* at A33, A34. The Magistrate noted, but did not find dispositive, the fact that petitioner's "nemesis was her supervisor and owner of the company" *Id.* at A37.

The Magistrate's Report was adopted by the district court in a one paragraph order, *id.* at A4-A5, and affirmed by the Court of Appeals in a three paragraph decision. *Id.* at A2-A3.

SUMMARY OF ARGUMENT

This case presents the Court with the difficult task of defining sexual harassment, and distinguishing unlawful behavior in the workplace from protected expression under the First Amendment. More specifically, this case requires the Court to determine when sexual harassment in the workplace can appropriately be characterized as sexual discrimination and thus prohibited under Title VII.

By its express terms, Title VII bars discrimination on the basis of sex in the "compensation, terms, conditions, or privileges of employment." The broad mandate of Title VII was designed to ensure equal employment opportunity by addressing the "entire spectrum" of discriminatory treatment that women and other minorities have encountered on the job. *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978).

Discriminatory decisions with regard to hiring, firing, promotion, and salary represent one end of the "spectrum." In each such case, the impact of the discrimination is easily calculated in terms of lost dollars. Discrimination, however, can and often does take subtler forms. Thus, as this Court recognized in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986), Title VII also prohibits sexual harassment that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive

working environment."

In rejecting petitioner's claim, the Sixth Circuit applied a very different rule. Under the Sixth Circuit's approach, it is not enough for a Title VII plaintiff to prove that sexual harassment interfered with her job performance. Nor is it sufficient to show the existence of a "hostile working environment" that adversely affected the plaintiff's psychological well-being. Instead, a Title VII plaintiff in the Sixth Circuit must prove both severe psychological injury *and* job impairment.

There are several problems with this formulation. First, it is inconsistent with the approach adopted by this Court and by the EEOC. In effect, the Sixth Circuit has reinstated the "tangible" injury requirement that this Court explicitly rejected as a condition for Title VII claims in *Vinson*. 477 U.S. at 64. Second, it penalizes women who are strong enough to withstand a pattern of harassment that is nonetheless inappropriate as a condition of employment under Title VII. By so doing, it merges what should be separate inquiries into liability and remedy.

In a somewhat analogous context, this Court recently held that a showing of significant physical injury is not necessary to establish an Eighth Amendment claim, although the existence of a significant physical injury is plainly relevant to damages. *Hudson v. McMillian*, 503 U.S. ___, 112 S.Ct. 995 (1992). Likewise, the existence of severe psychological injury may increase the damages available to a victim of sexual harassment, but it is not essential to establishing a Title VII claim. At the very least, a victim of sexual harassment under Title VII may well be entitled to equitable relief even in the absence of the severe psychological injury now required by the Sixth Circuit.

For these reasons, we believe that the standard applied by the lower courts in this case fails to reflect con-

gressional intent and is insufficiently sensitive to the problems of discrimination that continue to plague women in the workforce. It is essential, however, that the effort to eradicate discrimination not ignore First Amendment rights or confuse nondiscrimination with political orthodoxy. We therefore disagree with the notion that "offensiveness" is the touchstone of a Title VII violation. As this Court has repeatedly held, the First Amendment often compels us to tolerate "offensive" speech as the price of a free society. *E.g., Cohen v. California*, 403 U.S. 15 (1971).

In our view, the appropriate inquiry in a sexual harassment case must begin with the challenged conduct itself.⁵ If that conduct, which may involve expression, is sufficiently pervasive or intense that a reasonable person in the plaintiff's position would be significantly hindered in her job performance *or* significantly and adversely affected in her mental, emotional or physical well-being, then Title VII has been violated. The more pervasive the conduct, the less intense it must be; the more intense the conduct, the less pervasive it must be. Moreover, in assessing the impact of the challenged behavior, it is appropriate to consider the totality of the circumstances. For example, are the complaints directed against the boss or a co-worker? Do they involve pure speech or physical contact? Were the comments made in private or in front of clients? Were they part of a work-related discussion or a more general exchange of political views?

In exercising the judgment required by Title VII, the appropriate focus must be on the unique characteristics

⁵ The challenged conduct in this case was plainly directed at petitioner. The question of how to analyze a claim of harassment based on untargeted speech is not presented by this record and thus not before the Court. *Cf. Robinson v. Jacksonville Shipyards, Inc.*, 760 F.2d 1486 (M.D.Fla. 1991), *argued*, No. 91-3655 (11th Cir. Dec. 2, 1992)(harassment claim based on both targeted and untargeted speech).

of the workplace. It is these characteristics -- including the existence of authority relationships that limit the opportunity of many employees to respond and the economic necessity that forces many employees to remain -- that justify the government's concern under Title VII and support its regulatory authority.

Finally, because the lower courts applied an erroneous legal standard in this case, the appropriate remedy is to remand for reconsideration of the factual record in light of the correct legal standard. *See Pullman-Standard v. Swint*, 456 U.S. 273, 293 (1982).

ARGUMENT

I. THE LOWER COURTS IN THIS CASE MISCONSTRUED TITLE VII BY HOLDING THAT A CLAIM OF SEXUAL HARASSMENT DEPENDS UPON PROOF OF BOTH JOB IMPAIRMENT AND PSYCHOLOGICAL INJURY

The notion that sexual (or racial or religious) harassment is beyond the reach of the law unless the factfinder concludes that it would have the twofold effect of impairing the "work performance" of a reasonable employee *and* severely affecting "the psychological well-being of that reasonable person under like circumstances," Pet. App. at A28-A29, is a serious impediment to equal employment opportunity and thus to the goals that animated Congress when it enacted Title VII. *See, e.g., Connecticut v. Teal*, 457 U.S. 440, 448 (1982); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

It is hardly surprising, therefore, that the legal standard applied below finds no support in the language of Title VII. It is inconsistent with this Court's decision in *Vinson*. It has been repudiated by the EEOC. And it has been not been adopted by the large majority of circuits to deal with the issue of harassment in the post-

Vinson years.

The language of Title VII, of course, does not refer to either job impairment or psychological injury. Instead, it refers to discrimination in the "terms, conditions, or privileges of employment." 42 U.S.C. §2000e-2 (a). This broad wording was deliberately chosen. As the Court has frequently recognized, it reflects a clear congressional intent "to strike at the entire spectrum of disparate treatment of men and women" in employment. *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. at 707 n.13.

The approach followed by the Sixth Circuit in this case considerably narrows the "spectrum" of discriminatory behavior that can be redressed under Title VII. By insisting upon proof of job impairment in addition to psychological injury, the Sixth Circuit has restored the requirement of "tangible" injury that this Court specifically rejected in *Vinson*. 477 U.S. at 64. Conversely, by demanding proof of psychological injury even when job impairment is shown, the Sixth Circuit has imposed a requirement on sexual harassment cases that does not exist in other areas of discrimination law. By insisting upon both job impairment and psychological injury, the Sixth Circuit has left women without any remedy if they continue to perform their jobs competently despite harassment or, alternatively, if they are affected in their job performance but not emotionally disabled.

The central holding of *Vinson* is clearly to the contrary. Quoting the relevant EEOC Guidelines, this Court declared that Title VII bars sexual harassment where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 477 U.S. at 65 (emphasis

added).⁶

While purporting to apply *Vinson*, the Sixth Circuit rule dramatically transforms its meaning. What this Court conceived as alternative theories for establishing liability under Title VII, the Sixth Circuit has merged into a single large obstacle to Title VII relief. The difference, quite obviously, is more than semantic. The shift from "or" to "and" has important substantive consequences. Recognizing those consequences, the EEOC has expressly rejected the Sixth Circuit's approach. See "EEOC: Policy Guidance on Sexual Harassment," 8 Fair Employment Practices Manual (BNA) 405:6681 (Mar. 19, 1990). After noting that the prevailing rule in the Sixth Circuit requires proof of psychological injury in all harassment cases, the EEOC pointedly concluded its own policy statement with the following observation: "It is the Commission's position that it is sufficient for the charging party to show that the harassment was unwelcome and that it would have substantially affected the work environment of a reasonable person." *Id.* at 6690 n.20.

This is also the view of the Ninth Circuit, which like the EEOC, has expressly disagreed with the strict test for liability imposed on Title VII plaintiffs in the Sixth Circuit. Contrasting its approach with the Sixth Circuit's, the Ninth Circuit has written: "Surely, employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation." *Ellison v. Brady*, 924

⁶ The Guidelines quoted in *Vinson* are set forth at 29 U.S.C. §1604.11 (a)(3). On various occasions, this Court has described the Guidelines as "constitut[ing] a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Vinson*, 477 U.S. at 65; *General Electric v. Gilbert*, 429 U.S. 125, 141-42 (1976).

F.2d 872, 878 (9th Cir. 1991).⁷

Other circuits have been less explicit, but by continuing to rely on the language of *Vinson* they have at least implicitly rejected the more stringent test adopted by the Sixth Circuit and applied below. See, e.g., *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988); *Carrero v. New York City Housing Authority*, 890 F.2d 569, 577 (2d Cir. 1989); *Hall v. Gus Construction Co.*, 842 F.2d 1010, 1013 (8th Cir. 1988); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir. 1987).⁸

The emphasis on psychological injury incorporated by the Sixth Circuit into its analysis of every harassment claim under Title VII rests, in our view, on a critical failure to distinguish between liability and remedy. The existence of psychological injury is certainly relevant to any assessment of damages for harassment under Title VII. And, in the absence of job impairment, the fact that harassment was serious enough to affect the physical, emotional, or mental well-being of a reasonable person in the plaintiff's position ought to be sufficient to state a claim. See Point II, *supra*. But, contrary to the view of the Sixth Circuit, the absence of psychological injury cannot and should not negate a claim of sexual harassment if the record demonstrates that the job performance of a

⁷ It is certainly true, as the Supreme Court noted in *Vinson*, that "[o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers." 477 U.S. at 66, quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972). However, as the Ninth Circuit aptly pointed out in *Ellison*, neither *Vinson* nor *Rogers* "hold[s] that a hostile environment only exists when the emotional and psychological stability of workers is completely destroyed." 924 F.2d at 878 n.8.

⁸ By contrast, the Seventh Circuit appears to share the Sixth Circuit's view that psychological injury is an indispensable element of any harassment claim under Title VII. See *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 213 (7th Cir. 1986).

reasonable person in like circumstances would have been significantly impaired. *Id.*

Indeed, to the extent that the Sixth Circuit rule rests on the unspoken assumption that the "reasonable" response to workplace harassment is anxiety and debilitation rather than anger and resentment, it suffers from its own discriminatory biases about the status of victims in our society. At the very least, a plaintiff who demonstrates harassment under Title VII is entitled to equitable relief regardless of whether or not damages are appropriate on a particular record.⁹

Last Term, this Court considered and rejected an analogous argument in *Hudson v. McMillian*, 112 S.Ct. 995. Specifically, the Court held that a claim of excessive force under the Eighth Amendment does not require a showing in every case that the victim of the excessive force has also suffered a "significant injury." Instead, the Court ruled, the critical question under the Eighth Amendment is whether the state has engaged in the "unnecessary and wanton infliction of pain." *Id.* at 998, quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

Of course, this is not to say that the issue of injury is irrelevant in Eighth Amendment cases. As the Court recognized, "the extent of injury . . . is one factor that may suggest" whether the use of force was, as alleged, unnecessary and wanton. *Hudson*, 112 S.Ct. at 999. In addition, an Eighth Amendment plaintiff who is able to show significant injury obviously has a stronger claim for damages once a constitutional violation is established. "The absence of serious injury is therefore relevant to the Eighth Amendment inquiry, but does not end it." *Id.* at 999.

Similarly, the absence of psychological injury may be

⁹ In that regard, it is worth noting that the petitioner in this case sought injunctive relief as well as damages. Pet.App. at A2.

relevant in sexual harassment cases but, contrary to the view of the Sixth Circuit, it is not dispositive. Just as it is possible to catalogue a list of sadly common tortures that do not inflict significant physical injury, *id.* at 1002-03 (Blackmun, J. concurring), it is surely possible to contemplate forms of harassment that should be unacceptable as a condition of employment whether or not they cause serious psychological injury.

The most plausible explanation for the psychological injury requirement imposed by the Sixth Circuit is that it is an attempt to distinguish between trivial and substantial claims of harassment. Nevertheless, the standard chosen by the Sixth Circuit remains inappropriate. Precisely the same justification was offered for the significant injury test proposed in *Hudson*. This Court, however, properly concluded that a physical injury test was unnecessary to assure that "every malevolent touch by a prison guard" does not give rise to an Eighth Amendment claim. *Id.* at 1000.

Likewise, a psychological injury requirement is unnecessary to assure that every off-color joke or sexual remark in the workplace does not result in a Title VII lawsuit. See, e.g., *Rogers v. EEOC*, 454 F.2d at 238 ("mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment sufficiently to violate Title VII), cited in *Vinson*, 477 U.S. at 67. Even more fundamentally, the fear of frivolous litigation cannot support a standard that has the simultaneous effect of screening out meritorious claims.¹⁰

One helpful way to think about the problem of

¹⁰ In any event, the floodgate argument does not appear to be supported by the reported cases. Even in those circuits that have not embraced the Sixth Circuit's more stringent standard, there is very little evidence that women (or other minorities) are running to court to file frivolous harassment claims based on casual or isolated remarks.

harassment, and the corresponding flaws in the Sixth Circuit's approach, is to consider the case of a black employee who discovers a figure hanging in effigy from her desk lamp each day when she reports to work.¹¹ Surely, that employee has suffered harassment under any reasonable definition of the term. Yet, that employee would not be entitled to relief under the Sixth Circuit's interpretation of Title VII as long as she continued to perform her job competently. And, even if her job performance were affected, she would still not meet the Sixth Circuit's test unless she also demonstrated a severe adverse impact on her psychological well-being (that may or may not embrace a fully understandable anger at her mistreatment). This Court should not endorse a result so plainly at odds with the overriding purpose of Title VII, which was designed to promote equal employment opportunity without regard to race, color, religion, sex, or national origin. See, e.g., *Connecticut v. Teal*, 457 U.S. at 448; *Griggs v. Duke Power Co.*, 401 U.S. at 429-30.

II. AN APPROPRIATE HARASSMENT STANDARD MUST TAKE INTO ACCOUNT BOTH THE REALITIES OF THE WORKPLACE AND THE BREATHING SPACE REQUIRED BY THE FIRST AMENDMENT FOR EVEN OFFENSIVE SPEECH

As a shorthand statement of the principle that sexual harassment in the workplace can be actionable under Title VII, this Court's reference in *Vinson* to "an intimidating, hostile, or offensive working environment" served its intended purpose. 477 U.S. at 65. As a governing legal rule for resolving actual disputes, it has led to confusion in the lower courts that can and should be resolved.

¹¹ Unfortunately, these facts are not hypothetical. See, e.g., *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1266 (7th Cir. 1991); *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1506 (11th Cir. 1989).

Some courts, like the Sixth Circuit, have interpreted *Vinson* as requiring proof of job impairment and psychological injury in every case. Our disagreement with that approach has already been noted. Others have read the language of *Vinson* as permitting recovery whenever a reasonable person would be offended by the challenged expression or behavior. See Pet.Cert. at i. In our view, that approach is also misguided, albeit in the opposite direction.

At the outset, it is clear but worth restating that the rules developed by Congress and this Court for defining sexual harassment must meet First Amendment standards insofar as speech is involved, even when the sexual harassment dispute arises between private parties. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (enforcement of common law rules defining libel create state action for First Amendment purposes). It is equally clear as a matter of First Amendment law that "the fact that society may find speech offensive is not a sufficient reason for suppressing it." *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978).

Accordingly, this Court has long regarded it as "firmly settled" that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969). To the contrary, as this Court has frequently noted,

[a] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.

Terminiello v. Chicago, 337 U.S. 1, 4 (1949). See also *Cox v. Louisiana*, 379 U.S. 536, 551 (1965); *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971).

Applying that principle in *Texas v. Johnson*, 491 U.S. 397 (1989), this Court struck down a state law that made it a crime to burn the American flag "in a way that the actor knows will seriously offend one or more persons likely to observe or discover his actions." In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), a unanimous Court held, in an opinion by Chief Justice Rehnquist, that a public figure could not recover damages for the intentional infliction of emotional distress based on the "outrageousness" of a published parody. And, in *Forsyth County v. Nationalist Movement*, 505 U.S. ___, 112 S.Ct. 2395 (1992), this Court reaffirmed its longstanding view that First Amendment rights should not be diminished by a heckler's veto, which had been incorporated in that case into the local standards for issuing a parade permit.

In short, a legal rule that turns on the offensiveness of speech -- whether judged objectively or subjectively -- is fraught with First Amendment dangers. Among other things, it sweeps far too broadly. See *NAACP v. Button*, 371 U.S. 415, 433 (1963) (First Amendment requires "breathing space" to survive). In the Title VII context specifically, there are innumerable comments made in offices around the country that undoubtedly give offense, sometimes intentionally and sometimes not. Without more, that cannot be enough to override our national commitment to a robust exchange of ideas, see *New York Times v. Sullivan*, 376 U.S. at 270, even in the workplace.

On the other hand, the First Amendment does not bar the government from regulating behavior that significantly impairs the equal employment opportunities of women and other minorities simply because speech is also involved. See *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations*, 413 U.S. 376 (1973) (upholding the use of a local antidiscrimination law to prohibit the publication of sex-segregated employment ads).

As this Court has noted in other contexts, the realities of the workplace have an inevitable impact on First

Amendment doctrine. Thus, at the same time that this Court recognized the First Amendment rights of public employees, it also recognized the state's interest as an employer in ensuring the effective functioning of its offices. *Pickering v. Board of Education*, 391 U.S. 563 (1968). Acting as sovereign rather than employer, the government has at least an equivalent interest in ensuring that the work of private employees is not disrupted by sexual harassment, even if that disruption is occasioned by speech.¹²

In addition, it is for all practical purposes impossible for a victim of sexual harassment in the workplace simply to walk away or shut her eyes. She is in a very different position, therefore, than someone walking through a courthouse lobby who is confronted by a controversial political message, see *Cohen v. California*, 403 U.S. at 21, or someone who would rather not receive a political insert with her utility bill, see *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 542 (1980). To be sure, she can quit her job, but the Constitution should not compel that Hobson's choice by depriving Congress of the ability to craft an alternative legal remedy.

Finally, the existence of hierarchical relationships within the workplace often makes it extraordinarily difficult for the victim of harassment to respond in any meaningful way, if at all. That problem is compounded, moreover, by the fact that harassment is rarely designed to elicit a response or, more to the point, to precipitate

¹² In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Court similarly held the First Amendment rights of public school students must be measured against the state's interest in avoiding disruption within the school. Significantly, however, the Court also held in *Tinker* that the regulation of speech must be justified by "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509. In Title VII cases, as well, specific factual findings are required to sustain a harassment claim. See pp.18-19, *infra*.

a dialogue. When Justice Brandeis wrote that the remedy for speech "is more speech, not enforced silence," *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), he was attempting to limit the government's ability to censor its critics. The operating assumptions are very different in the workplace where many employees have little choice but "enforced silence" when they are harassed on the job by their own boss, or by co-workers with the tacit or direct approval of the boss.

In construing Title VII, this Court's definition of harassment must take into account both the realities of the workplace and the demands of the First Amendment. The Constitution does not protect the right to discriminate. See, e.g., *Runyon v. McCrary*, 427 U.S. 160, 176 (1976). But when discrimination is accomplished through speech, the dividing line between what is lawful and unlawful must be drawn with sensitivity to the First Amendment values at stake. Cf. *Roberts v. United States Jaycees*, 468 U.S. 609, 621 (1984) (fraternal organization's policy of admitting virtually all men undermines associational claim to exclude all women).¹³ In addition, the line between protected and unprotected conduct must be sufficiently clear so that it can reasonably be understood by those in the workplace who are most directly affected, as well as by those who must ultimately judge whether a violation of Title VII has occurred. Cf. *Smith v. Goguen*, 415 U.S. 566, 573 (1974).

As the welter of lower court decisions since *Vinson* has demonstrated, the concept of a hostile working environment lacks the clarity that the Constitution requires in this context. Accordingly, this Court should now make explicit what we believe was implicit in *Vinson* --

¹³ *Roberts* also holds that the elimination of discrimination in the economic marketplace represents a compelling governmental interest. 468 U.S. at 628.

that sexual harassment is sexual discrimination when it involves conduct, including expressive conduct, that is both gender-related and sufficiently pervasive or intense that it would either (a) significantly hinder a reasonable employee from doing her job or (b) significantly affect a reasonable employee's mental, emotional or physical well-being.

This formulation is broader than the Sixth Circuit's, narrower than an offensiveness test, and more specific than the reference to a hostile working environment. By requiring a showing of pervasiveness or intensity, it weeds out trivial claims while recognizing that some forms of harassment are so severe that they should be actionable even if they are relatively isolated.¹⁴ By using the term "gender-related," it makes clear that harassment can occur even in the absence of sexually explicit remarks.¹⁵ By relying on a reasonable employee standard, it eliminates the problem of the unduly thin-skinned plaintiff. By providing a remedy for women who are significantly hindered in their job performance by work-

¹⁴ The EEOC has also recognized that pervasiveness and intensity may be inversely related as preconditions for a harassment claim. See "EEOC Policy Guidance," *supra* at 405-6690 ("a single, unusually severe incident of harassment may be sufficient to constitute a Title VII violation; the more severe the harassment, the less need to show a repetitive series of incidents"). See also *Ellison v. Brady*, 924 F.2d at 878.

¹⁵ For example, repeated and demeaning comments about a female employee's ability to perform her job assignment because she is a woman may constitute harassment in appropriate circumstances even in the absence of any sexual references or overtures. Once again, this view is in accord with the EEOC's current thinking. See "EEOC Policy Guidance," *supra* at 405-6692. See also *Andrews v. Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990); *Hicks v. Gates Rubber Co.*, 833 F.2d at 1415.

place harassment, it most directly reflects the language of Title VII, which bars discrimination in the terms, conditions, or privileges of employment." By authorizing relief upon the alternative showing that the mental, emotional, or physical well-being of a reasonable employee would be significantly affected by the harassment that the plaintiff was forced to endure, it does not penalize the worker who continues to perform her job competently while suffering in other ways outside the office. For all of these reasons, the formulation we propose is most faithful in our view to the dual goals of promoting equal employment opportunity and preserving the safeguards of the First Amendment.

Because the courts below applied an erroneous legal standard in this case (even if this Court does nothing more than reaffirm its prior holding in *Vinson*), and because the Magistrate's factual findings were so interwoven with his mistaken legal analysis, the case should be remanded for reconsideration of the record under the appropriate legal standard, as this Court did in *Vinson* under similar circumstances. 477 U.S. at 67-68. See also *Pullman-Standard v. Swint*, 456 U.S. at 293.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

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In The
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October Term, 1992

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BRIEF AMICUS CURIAE OF THE NATIONAL
EMPLOYMENT LAWYERS ASSOCIATION IN
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BRIEF AMICUS CURIAE OF THE NATIONAL
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SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The National Employment Lawyers Association (NELA) is a national bar association of over 1500 lawyers who regularly represent employees in employment-related disputes. NELA members thus represent many victims of sexual harassment.

NELA has a compelling interest in ensuring that Title VII's goal of eradicating employment discrimination is fully realized. It thus submits this brief because of the importance of the issues at bar to furthering this goal.

The written consents of all parties have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

This case presents the Court with an opportunity to clarify the proper standards for analyzing sex-based job harassment. NELA proposes that the Court reject the Sixth Circuit's requirement that severe psychological injury serve as a necessary component to establish liability under Title VII. This requirement accords with neither Title VII nor this Court's earlier opinion in *Meritor Savings, FSB v. Vinson*, 477 U.S. 57 (1986).

In its place, NELA proposes a standard that views the harassment from the perspective of a reasonable woman and leaves assessment of the psychological injury caused by the harassment to the damages – rather than liability – inquiry. In addition, NELA proposes a second subjective standard to be used in those limited cases in which a woman informs her employer of a specific sensitivity to sex-based harassment and the employer fails to make reasonable accommodations.

NELA also proposes a standard for determining whether constructive discharge has occurred that, unlike the precedent of the Sixth Circuit, does not limit the relief provided in Title VII only to those few women who are superhuman – or desperate – enough to continue working in a hostile working environment that a reasonable woman would leave.

Finally, NELA briefly addresses potential First Amendment concerns about limiting the speech of sexual harassers in the event this Court decides to consider this issue.

ARGUMENT

I. This Court should strongly disavow the Sixth Circuit's Decision in *Rabidue v. Osceola Refining Co.*

The Court's first duty in this case is to so strongly disavow *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987), that, in the future, this opinion is cited only in the same context that one might cite *Plessy v. Ferguson*, 163 U.S. 537 (1896) ("colored" railroad passengers could be compelled to accept "separate but equal" accommodations) and *Bradwell v. State*, 16 Wall. 130 (1873) (women are not "persons" who have the right to practice law).

A. The Sixth Circuit's legal reasoning in *Rabidue* is seriously flawed.

In *Rabidue* – a decision on which the lower court in *Harris* heavily relied, the Sixth Circuit found that, even though the plaintiff proved, among other objectionable conduct, that a male supervisor called women "whores," "cunt," "pussy," and "tits," she did not prove that her work environment was sufficiently hostile to establish a claim under Title VII.¹ Several serious flaws mark this shocking opinion. First, the *Rabidue* court would require a plaintiff to show severe psychological injury as a threshold for liability. 805 F.2d at 624. Second, the *Rabidue* majority blithely ignored the remedial purpose of Title VII and instead ruled that, because boys will be boys, the

¹ Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*

status quo precluded liability in a hostile work environment case of sexual harassment.

1. Proof of severe psychological injury has no place in a liability determination.

The first flaw in the *Rabidue* decision – and the issue on which this Court granted certiorari – is that its majority essentially put the cart before the horse. The initial question posed in most civil cases is whether a defendant is liable to a plaintiff. The *Rabidue* majority and its followers, however, wish to first examine the plaintiff's wounds to ascertain whether the damages are serious enough to warrant the court's attention. This requirement, which has no precedent in other personal injury actions, could, if extended beyond Title VII, absurdly provide that only victims who are severely injured in an automobile accident can recover damages from the drunk driver who caused the accident.²

This particular flaw of *Rabidue* – its requirement that a victim demonstrate "serious psychological injury" before liability can be found – is persuasively refuted in the Petitioner's brief, as well as in the amici briefs of, for

² Once a violation of the law is established, then the court may turn its attention to damages and assess the extent and severity of the victim's reaction to the harassment. The person's injuries may be either minor or unexpectedly large. See, e.g., *Dulieu v. White*, 2 K.B. 669, 679 (1901) (a decision credited as the origin of the right of the "eggshell skull" plaintiff, i.e. one who suffers death where a normal person would have had only a bump on the head, to recover in damages so long as liability is established).

example, the Women's Legal Defense Fund and the NAACP Legal Defense and Education Fund, Inc. Because NELA believes that the rationale for rejecting this reasoning is cogently and aptly presented by the Petitioner and other amici, it does not write separately on this issue.

2. Acceptance of the status quo as a defense to a hostile work environment claim frustrates the goals of Title VII.

Rabidue's second flaw is that it accepts the status quo as a defense in hostile work environment cases.³ In the *Rabidue* court's reasoning, the sexual epithets hurled at the women in the workplace, together with the concurrent display in the workplace of pictures of nude or semi-nude women, were merely a legitimate expression of the cultural norms of workers at the plant. *Id.* at 622. After observing that this was the prevailing atmosphere of the plant, where the plaintiff had voluntarily gone to work,⁴

³ *Rabidue* is not alone in this "take the workplace as you find it" position. See, e.g., *Weinsheimer v. Rockwell International Corp.*, 754 F.Supp. 1559, 1561, 1566 (M.D. Fla. 1990) (requests by male co-worker that complainant "suck him" and "give him head" were "consistent with the general environment in the back shop" and not "sufficiently severe" to violate Title VII), *aff'd*, 949 F.2d 1162 (11th Cir. 1991).

⁴ Ignoring the economic realities that underlie a person's decision to accept employment, the *Rabidue* majority argues that the plaintiff, in effect, assumed the risk of working in a hostile environment by going to work in a male-dominated plant. The court thus suggests that the plaintiff could have elected to forego this employment opportunity – an economic choice that few women have in this society. The very fact that women occupy a subordinate position in the workforce, and thus have

the court ruled that the conduct of which she complained had only a "de minimis effect" on her work environment. *Id.* The court also thought it relevant to observe that, outside the workplace, the victim lives in a society that condones and commercially exploits "open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places." *Id.* at 627.

Title VII was not, however, designed to preserve the status quo – or to reward employers who maintain hostile working environments. Congress enacted this statute in 1964 because the workplace was fraught with discrimination in the fact, terms, and conditions of employment – a situation it declared should change. Clearly signalling the remedial purpose behind Title VII, Congress dictated that discrimination in the workplace on the basis of race, color, religion, national origin, or sex would no longer be tolerated. As the Third Circuit observed,

[W]hile Title VII does not require that an employer fire all "Archie Bunkers" in its employ, the law does require that an employer take prompt action to prevent such bigots from expressing their opinion in a way that abuses or offends their co-workers. By informing people that the expression of racist or sexist attitudes in public is unacceptable, people may eventually learn that such views are undesirable in private,

fewer options from which to select, is exactly what makes them more vulnerable to sexual harassment in the first place. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 40-47 (1979).

as well. Thus, Title VII may advance the goal of eliminating prejudices and biases in our society.

Andrews v. City of Philadelphia, 895 F.2d 1469, 1486 (3rd Cir. 1990) (quoting *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 350 (6th Cir. 1988), cert. denied, 490 U.S. 1110 (1989)).

B. *Rabidue* followed neither this Court's opinion in *Meritor* nor the EEOC Guidelines on Sexual Harassment.

In this Court's only prior opinion on the topic of sexual harassment in the workplace, *Meritor Savings, FSB v. Vinson*, 477 U.S. 57 (1986), the Court began with the observation that Congress passed Title VII with the affirmative intent to change the workplace – "to strike at the entire spectrum of disparate treatment of men and women in employment." *Id.* at 64 (quoting *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). The Court also noted that it could "readily envision working environments . . . heavily polluted with discrimination." *Meritor*, 477 U.S. at 66 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972)). The Court's vision was not, unfortunately, a figment of its imagination, but rather a recognition that, even though Title VII had been the law of the land for over twenty years, some employees were still forced to resort to the legal system to assert their right to "work in an environment free from discriminatory intimidation, ridicule, and insult." *Meritor*, 477 U.S. at 66.

Nonetheless, the *Rabidue* majority chose to reject an opportunity to rid the workplace of blatant hostility

towards women. Rather than finding the employer at fault for failing to take measures to cleanse the atmosphere of the sexism that pervaded the workplace, the *Rabidue* majority found fault with the victim, who accepted employment in that environment and then had the nerve to complain about it.

The majority's opinion in *Rabidue* also departs from the recommendations of the Equal Employment Opportunity Commission (EEOC), which has since sharply criticized that opinion in its written guidelines regarding sexual harassment. EEOC Policy Guidance on Sexual Harassment, 8 Fair Empl. Prac. Manual (BNA) 405:6691 (1990). Agreeing with Judge Keith, who dissented in *Rabidue*, the EEOC rejected the notion that the plaintiff "assume[d] the risk of harassment by voluntarily entering an abusive, anti-female environment" and reaffirmed that the goal of Title VII was to "prevent such behavior and attitudes from poisoning the work environment." *Id.* (quoting *Rabidue*, 805 F.2d at 626 (Keith, J., dissenting)).

This Court has previously deferred to the EEOC's guidelines and accepted the agency's interpretations of the law. *Meritor*, 477 U.S. at 65. In light of the remedial goal of Title VII, NELA urges that this Court once again take advantage of the EEOC's "body of experience and informed judgment" and expressly disavow the majority opinion in *Rabidue*.

C. The *Rabidue* majority also turned a blind eye to the real world of sexual harassment.

NELA members are often the first professionals to whom the victims of sexual harassment turn for assistance when their own coping skills prove insufficient to rectify a hostile working environment. Not surprisingly, our personal experiences as lawyers who represent victims of sexual harassment validate the observations of social scientists as to the pervasiveness of the problem – and as to the inability of many victims to remedy the problem on their own.

Like racial harassment, most incidents of sexual harassment lack any social value whatsoever.⁵ Some forms of sexual harassment, however, involve behavior that could be welcome under certain circumstances.⁶ For that reason (and because our society has yet to regard sexism with the same degree of abhorrence with which it regards racism), the courts – and members of our society – have, on occasion, grappled awkwardly with the issue. Obviously, given the various methods adopted by lower

⁵ See, e.g., *Miller v. Bank of America*, 600 F.2d 211, 212 (9th Cir. 1979) (plaintiff's supervisor demanded sexual favors from her, referring to her as a "black chick"); *Gilardi v. Schroeder*, 833 F.2d 1226, 1228-1229 (7th Cir. 1987) (employer drugged the plaintiff and raped her while she was unconscious).

⁶ Requests for dates and sexual flirtation in some circumstances are socially useful because they foster relationships between consenting individuals. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991) (the perpetrator could be portrayed as "a modern-day Cyrano de Bergerac wishing no more than to woo [the plaintiff] with his words").

courts to assess liability in sexual harassment cases, they are sorely in need of guidance from this Court.

Unlike racial harassment, sexual harassment runs the gauntlet from behavior that is obviously intolerable from any perspective to the grey areas that present situations that could be interpreted in various ways – depending on the perspective one uses to analyze them. They range from *quid pro quo* demands for sexual favors that offer, in return, continued employment (see, e.g., *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1045 (3rd Cir. 1977) (continued employment conditioned upon submission to sexual advances)) – to physical assaults and offensive touching (see, e.g., *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1409-1410 (10th Cir. 1987) (one supervisor rubbed plaintiff's thigh, another touched her buttocks, grabbed her breasts, and deliberately fell on top of her)) – to sexist and denigrating generalizations about women (*Rabidue*, 805 F.2d at 615; cf. *Hazen Paper Co. v. Biggins*, slip op. at 7, 61 U.S.L.W. 4323 (U.S. April 20, 1993) (age discrimination)).

Numerous studies have shown that sexual harassment affects virtually all women. See, e.g., NATIONAL COUNCIL FOR RESEARCH ON WOMEN, SEXUAL HARASSMENT: RESEARCH AND RESOURCES, A REPORT IN PROGRESS 9 (Nov. 1991). While many women quit their jobs because of sexual harassment, others continue to work, but suffer significant adverse physical and psychological effects. (*Id.* at 13-15). As noted in one of the early studies on the phenomena of sexual harassment, "Like women who are raped, sexually harassed women feel humiliated, degraded, ashamed, embarrassed, and cheap, as well as angry." CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF

WORKING WOMEN 47 (1979). The most common effects of sexual harassment that women defined in one study were fear, anger, anxiety, depression, self-questioning, and self-blaming. Mary P. Koss, *Changed Lives: The Psychological Impact of Sexual Harassment*, in IVORY POWER: SEXUAL HARASSMENT ON CAMPUS (M. Paludi ed., 1990). In fact, the American Psychiatric Association has recognized stress as a result of sexual harassment as a specific, diagnosable problem. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 11 (3d ed. 1987).

D. The majority opinion in *Rabidue* poisoned the lower courts' decisions in the instant case.

Without the precedence of *Rabidue*, the Petitioner would have prevailed in her sexual harassment claim. Teresa Harris, after all, proved to the satisfaction of the fact-finder that her supervisor, Charles Hardy, was "a vulgar man [who] demean[ed] the female employees at his work place," that he was "truly gross and offensive," that she was herself offended, and that his comments would "offend the reasonable woman." Magistrate's Report and Recommendation, *Harris v. Forklift Systems, Inc.*, No. 3:89-0557 (Nov. 27, 1990) (Pet. Writ at A-14, A-19). Nonetheless, based on the precedent set by *Rabidue* – the requirement that a plaintiff show that her psychological well-being was *seriously* affected by the hostile work environment before liability will attach – the fact-finder in the instant case concluded that the working environment was not "so poisoned as to be intimidating

or abusive" and that, despite the plaintiff's testimony, she was not "so offended that she suffered injury." Magistrate's Report, *supra* (Pet. Writ at A-19).

Under this Court's opinion in *Meritor* and the EEOC Guidelines, however, Teresa Harris would have prevailed. She proved, after all, that the workplace was "heavily polluted with discrimination" and that the atmosphere would have offended a reasonable woman. And, as this Court expressly recognized in *Meritor*, environments of this ilk are precisely what Congress determined to eliminate through passage of Title VII.

E. As rulings from other circuits reveal, many lower courts would benefit from this Court's adoption of a standard by which a claim of hostile working environment should be viewed.

The errors found in *Rabidue* are, unfortunately, not confined to opinions from the Sixth Circuit. The lower courts are divided on the proper standard by which to assess harassment cases under Title VII – whether the harassment is based on race or gender. Indeed, of the courts that have considered the issue, only the Eighth and Ninth Circuits have clearly recognized that the inquiry into psychological injury is a question of damages, not liability, in a sexual harassment case. Compare *Rabidue v. Osceola Refining Co.*, *supra*, with *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) (employees need not endure sexual harassment until their psychological well-being is seriously affected) and *Burns v. McGregor Electronic Ind.*, 955 F.2d 559, 566 (8th Cir. 1992) (complaining party must show only that she was as affected as a reasonable person

would be in like circumstances). See also *Downes v. FAA*, 775 F.2d 288, 293 (Fed. Cir. 1985) (complaining party must show misconduct that caused either interference with her work or her own serious psychological injury).

The courts are likewise divided on the perspective from which to judge whether harassment has occurred – that is, whether the work environment will be assessed from the perspective of the reasonable man, the reasonable woman, or both. Compare, e.g., *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988) (man's and woman's perspective should be considered on the issue of unwelcomeness), with *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3rd Cir. 1990) (the question is whether the work environment would be offensive to women of reasonable sensibilities) and *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (a reasonable person standard would not adequately consider the unique experiences of women workers).⁷

⁷ The courts are also split on the question of whether the work environment should be considered in determining whether harassment has taken place. Some courts have held that the complaining woman's allegations of harassment and/or injury must be viewed in light of the work environment overall. See, e.g., *Reynolds v. Atlantic City Convention Center*, 1990 WL 267417, 53 Fair Empl. Prac. Cas. (BNA) 1852, 1866 (D.N.J. 1990) (impact of obscene gestures and remarks must be discounted "in an atmosphere otherwise pervaded by obscenity"). Other courts have correctly held that traditional workplace norms have no bearing on a determination of whether a violation of Title VII has occurred. See, e.g., *Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271, 1275 (5th Cir. 1989) ("Work environments 'heavily charged' or 'heavily polluted' with racial or sexual abuse are at the core of the hostile environment theory") (citing *Meritor*, 477 U.S. at 66); *Andrews v. City of Philadelphia*, 895 F.2d

II. This court should adopt a standard by which lower courts may assess liability in hostile work environment cases that focuses on the perspective of the victim and entails both objective and subjective elements.

NELA proposes that this Court adopt a standard to be followed by the lower courts in assessing whether the facts of a particular sexual harassment claim prove that the hostile work environment of which the plaintiff complains violates Title VII. The standard, which should first assume that employers and their agents know the law,⁸ must be assessed from the perspective of the victim of the allegedly offensive behavior. After all, as the Ninth Circuit observed:

If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers

1469, 1486 (3rd Cir. 1990) (an employer of both men and women is not unfairly burdened by a requirement that it prevent an atmosphere of sexism from pervading the workplace).

⁸ While neither the language of Title VII itself nor the legislative history provides any guidance on the law of sexual harassment, guidelines published by the EEOC comprehensively define the duty of an employer to provide a workplace free of unlawful harassment. *EEOC Policy Guidance on Sexual Harassment*, 8 Fair Empl. Prac. Manual (BNA) at 405:6681 (1990). This duty cannot be defined by reference to the "reasonable person in the actor's shoes;" rather, the perspective must be from the viewpoint of the person experiencing the conduct in question. *Id.* at 405:6689 (1990). An actor, after all, must be presumed to know the law. See also Restatement (Second) of Torts § 286.

could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.

Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).

The standard NELA proposes is two-pronged: first, would a reasonable woman generally view the complained-of sex-based harassment as sufficient to create a hostile work environment? If so, liability is established. If the answer to that question is "no," however, the inquiry does not end. In many instances, the victim may be particularly vulnerable to some forms of harassment – and the employer knows that. If this is indeed the case, and the employer has failed to reasonably accommodate the needs of this particular employee, liability is also established.

A. The first part of the standard assesses liability from the perspective of the victim vis-a-vis the reasonable woman.

NELA strongly believes that only a standard that is fashioned from the perspective of the victim will help eradicate impermissible sex-based harassment in the workplace. Cf. *Harris v. International Paper*, 765 F.Supp. 1509, 1516 (D. Me. 1991) (appropriate standard to be applied in a hostile racial environment case was that of a reasonable black person), *order amended*, 765 F.Supp. 1529 (D. Me. 1991). Numerous researchers, after all, have documented the fact that, when asked whether certain behavior or actions constitute sexual harassment, women are far more likely than men to define a situation as

harassing. See NATIONAL COUNCIL FOR RESEARCH ON WOMEN, SEXUAL HARASSMENT: RESEARCH AND RESOURCES, A REPORT IN PROGRESS 6 (Nov. 1991) (and sources cited therein).

This standard will, admittedly, prove more difficult for courts to apply than the traditional "reasonable person" (from the actor's perspective) tort standard. Despite the temptation to travel the familiar road, however, this Court must reject the argument that the existence of a hostile work environment should be measured from the perspective of the actor. The principle of a "reasonable man," after all, is based on an assumption that this hypothetical ideal person possesses the community's pre-existing good moral character and knows right from wrong. Cf. *Ellison*, 924 F.2d at 879 ("the reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women").

The rationale behind Title VII – that the workplace was sorely afflicted by the evils of discrimination and in dire need of change – reveals that the traditional inquiry into how the hypothetical reasonable actor would have acted is inappropriate. In the words of the Ninth Circuit, "Title VII is aimed at the consequences of effects of an employment practice and not at the . . . motivation' of co-workers or employers." *Id.* at 880 (quoting *Rogers v. EEOC*, 454 F.2d at 239, also citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)) (absence of discriminatory intent does not redeem an otherwise unlawful employment practice)). Thus, regardless of the fact that many individuals in the workplace may hold racist and/or sexist beliefs, Congress has directed that those beliefs cannot be allowed to poison the workplace because they rob our

society of the benefits that could be achieved were our society to have the full participation of each individual.

While NELA certainly does not contend that all men believe that sex-based harassment is either reasonable or appropriate work behavior, NELA is acutely aware that numerous male-dominated industries still exist in the workplace – where women are often harassed because their presence in that environment is viewed as inappropriate. In these non-traditional work environments, sexual harassment of female employees, few in number, operates to drive those few women from the non-traditional workplace and to discourage others from working there. Likewise, as the instant case confirms, the hierarchical relationship between men and women that exists in other, more traditional, employment settings is the reality of most women's experience in the workplace, and often leads to the type of sex-based harassment that is based on a desire to assert power.

Only a standard that considers the viewpoint of the minority in the workplace can ever hope to improve it. Otherwise, as both *Rabidue* and the case at bar poignantly illustrate, if the perpetrator's perspective is the standard viewpoint from which the harassing behavior is assessed, the harassment will be characterized by the perpetrator – and the courts – as only joking behavior or a normal part of a rough and tumble workplace.⁹ On the other hand,

⁹ As in the present case, sexual harassment is often characterized as harmless joking by men. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 Yale L. J. 1177, 1199 & n.81, 1207-1208 & n.110 (and sources cited therein) (1990). Another researcher reports that the characteristically male view depicts sexual harassment as comparatively harmless amusement. Abrams,

were this Court to announce that, henceforth, all hostile work environment cases will be analyzed from the victim's perspective, employers would take their duty to rid the workplace of sex-based harassment much more seriously. And, as the EEOC has observed, "Prevention is the best tool for the elimination of sexual harassment." 29 C.F.R. §1604.11(f).

By viewing the harassment from the perspective of a reasonable woman, this standard also strikes a balance between the concerns expressed by the Respondent – that too loose a standard could have a chilling effect on otherwise legitimate conduct – and the concerns of the Petitioner – that the *Rabidue* standard forces a victim into a Catch-22 situation – either quit or wait until the harassment become so debilitating that one must obtain psychological counseling.

B. The second part of the standard assesses liability from the victim's subjective perspective – if the employer knew that this employee was particularly sensitive to certain conduct and did not make reasonable accommodation for that sensitivity.

NELA also advises that the test for determining actionable sex-based harassment include a subjective element.

Gender Discrimination and the Transformation of Workplace Norms, 42 Vand. L. Rev. 1183, 1203 (1989). And, as another study observed, "Comments such as, 'Can't you take a joke?' 'You're being overly sensitive' and 'Lightenup!' are painfully familiar to any woman who has experienced the humiliation of sexual harassment." NATIONAL COUNCIL FOR RESEARCH ON WOMEN, SEXUAL HARASSMENT: RESEARCH AND RESOURCES, A REPORT IN PROGRESS 4 (Nov. 1991).

An employer should, after all, also be held accountable for all foreseeable consequences of its sex-based actions if those consequences are such that they could have been prevented with reasonable accommodation.

In order to make out a case of sex discrimination under this second prong, an employee would have to show that she informed her employer of her particular sensitivity and that her employer ignored her reasonable needs for accommodation. Consider, for example, an employee who informs her employer that, because she was previously victimized by a sexual assault, any acts of familiarity by a male co-worker that include physical contact, regardless of the man's intent, cause her intense psychological injury. The employer's knowledge of that particular sensitivity, if it fails to make reasonable accommodation, could lead to a successful claim of sexual harassment. The same employee could not, however, prevail on a claim for damages if she did not inform her employer that she required special accommodation. Like the person who suffers a temporary disability and asks only that a reasonable accommodation be made for her condition, a woman who has, for example, suffered through the trauma of a sexual assault should not be victimized again by a callous employer or a sexual harasser who targets the weaker and more vulnerable females employees as his victims.

The aim of this subjective portion of the test is not to require employers to respond to hypersensitive individuals who, for example, are offended by the use of any curse words. This part of the standard serves only to ensure that special circumstances, which are previously

communicated to the employer, do not serve as a springboard for inappropriate sex-based harassment.

III. NELA also suggests that its proposed standard be applied in constructive discharge cases, such as the one presented here.

The third significant error made by the lower courts in the instant case was the determination that Teresa Harris could not prevail on her constructive discharge claim because she could not prove that her employer specifically intended to cause her to resign. Magistrate's Report, *supra* (Pet. Writ at A-21).

While not precisely presented in the question posed to the Court, NELA notes that the lower courts' error in this regard presents this Court with an opportunity to conform the disparate holdings of the Circuits on the issue of constructive discharge and announce a standard that, unlike the lower courts' decisions in this case, accords with both the underlying purpose of Title VII and the spirit of this Court's opinion in *Meritor*.

In *Meritor*, this Court recognized that proof of a hostile working environment could establish a Title VII claim. How ironic, then, would it be for this Court to interpret Title VII to say that, although sexual harassment is illegal and the plaintiff has made a sufficient showing that a reasonable woman would have quit after having endured the specific harassment, the harassment is not actionable unless the woman can make the almost impossible showing that her employer wanted her to take this action. A defense that the employer had no intent to cause the woman to leave cannot be squared with a law

that prohibits the conduct and was designed to eliminate it in employment. *Meritor* did not intend to allow complaints only by those who, because of economic necessity or incredible fortitude, continue to function in the workplace despite the harassment. It intended, as Title VII intends, to rid the workplace of the scourge of sex-based harassment.

With the law of constructive discharge – as with the law of hostile working environment generally – any standard that is set from the employer's perspective cannot hope to serve the underlying purpose of Title VII. Concerns about a flood of lawsuits about minor slights are resolved by utilizing a reasonable woman standard in both instances – not by supporting a standard that ignores women altogether.

A. The courts are divided about the proof necessary to demonstrate constructive discharge.

Just as the Circuits are at odds on the appropriate standard by which to judge a hostile work environment, the lower courts also disagree as to the proof required to show a constructive discharge. One-half of the Circuits properly hold that a constructive discharge occurs whenever the complainant's resignation is reasonably caused by and proximate in time to the intolerable working conditions – provided the employer is responsible therefor and a reasonable person in the plaintiff's position would have resigned.¹⁰

¹⁰ *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989); *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307 (5th Cir.

The remaining Circuits err by requiring an additional element to prove a constructive discharge. These Circuits¹¹ require evidence that the employer *intended* to force the employee to resign – an onerous burden indeed. As this Court noted in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1963), in fact, direct evidence of an employer's state of mind or intent can be difficult – if not impossible – to obtain. *Id.* at 716.

B. Concerns about frivolous claims of discharge are appropriately resolved by the reasonable woman standard.

The standard currently employed by the Ninth Circuit for analyzing constructive discharge cases properly accords with the aims of Title VII. By contrast, the incredibly stringent standard employed by the Sixth Circuit, among others, improperly – and impermissibly – limits Title VII relief to superhuman plaintiffs. NELA asks this Court to explicitly reject the Sixth Circuit's erroneous additional requirement for proof of constructive discharge.

1987); *Garner v. Wal Mart Stores*, 807 F.2d 1536 (11th Cir. 1987); *Calhoun v. Acme Corp.*, 798 F.2d 559 (1st Cir. 1986); *Goss v. Exxon Office System*, 747 F.2d 885 (3rd Cir. 1984); *Satterwhite v. Smith*, 744 F.2d 1380 (9th Cir. 1984).

¹¹ *Yates v. AVCO Corp.*, 819 F.2d 630 (6th Cir. 1987); *Derr v. Gulf Oil*, 796 F.2d 340 (10th Cir. 1986); *Bishopp v. Dist. of Columbia*, 788 F.2d 781 (DC Cir. 1986); *Bristow v. Daily Press*, 770 F.2d 1251 (4th Cir. 1985), *cert. denied*, 457 U.S. 1082 (1986); *Martin v. Citibank*, 762 F.2d 212 (2nd Cir. 1985); *Easter v. Jeep Corp.*, 750 F.2d 520 (6th Cir. 1984); *Johnson v. Bunny Bread Co.*, 646 F.2d 1250 (8th Cir. 1981).

A plaintiff such as Teresa Harris should be able to prove a case of constructive discharge by showing, as she did, that she wrote a resignation letter immediately after Charles Hardy's shocking inquiry in mid-September about whether she had obtained an account by agreeing to allow a man to "bugger" her – and she resigned as soon as she received her commission check for the month of September. A reasonable woman would not continue to work in the face of such a shocking accusation – which was, in this case, made in front of co-workers. (Tr. I at 33, 64).

IV. The government's compelling interest in eradicating sexual harassment from the workplace overcomes any first amendment right that a perpetrator may have to engage in offensive speech.

Because some may argue that a prohibition against sex-based verbal harassment could implicate the First Amendment rights of the harassers, the issue must be addressed. While NELA does not propose that the Court consider this issue in the case at bar, it nonetheless briefly sets forth its views about the First Amendment protection of such speech in the event that the Court decides to address First Amendment concerns.

A. Title VII was designed to prohibit employment discrimination, not to impact speech.

Title VII is addressed to eliminating discrimination in employment – not eliminating speech in employment. Speech thus comes into play only because it, often in concert with conduct, is used as a tool to discriminate

against those protected by the statute. Verbal harassment, however, can be a more virulent form of discrimination than merely quietly determining in the back office not to promote a woman – a point clearly demonstrated in both *Rabidue* and this case.

Such “terms and conditions” of employment should not be shielded simply because the employer engages in verbal harassment, rather than – or in addition to – physical harassment.

B. The Court’s prior decisions confirm that sex-based harassing speech finds no protection in the First Amendment.

Should the Court feel compelled to consider the First Amendment implications of the proposed standard for gender-based discrimination, NELA asks that the Court rely on its previous decisions that have considered First Amendment rights vis-a-vis a claim of sex-based discrimination. In *Hishon v. King & Spaulding*, 467 U.S. 69 (1984), for example, the Court rejected a claim that application of Title VII to consideration of a law firm’s partnership decisions would infringe the partners’ constitutional rights of expression or association. In rejecting the law firm’s claim that the First Amendment insulated its partnership selection activities from scrutiny, the Court referred back to an earlier holding that

Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.

467 U.S. at 78 (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)). Amicus asks that this holding be reaffirmed with regard to sex-based harassing speech.

Likewise, in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Court pointed out that infringements on the right to associate may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms. In *Roberts*, the U.S. Jaycees sued state officials to prevent enforcement of the Minnesota Human Rights Act, alleging that, by requiring it to accept women as regular members, application of the Act would violate the male members’ constitutional rights of free speech and association. In rejecting the First Amendment claims of the U.S. Jaycees, this Court held that

We are persuaded that Minnesota’s compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members’ associational freedoms.

468 U.S. at 623. Like the statute at issue in *Roberts*, Title VII is not directed to suppression of ideas, but instead to achieving a compelling state interest – that of eradicating discrimination in employment. Indeed, as this Court noted in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971),

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable

group of white employees over other employees.

401 U.S. at 429-30.

C. When employment discrimination assumes the form of sex-based verbal harassment, the statute must prohibit such conduct or see its objectives frustrated.

When unlawful employment discrimination assumes the form, not of a refusal to hire, but of a requirement that women run a gauntlet of humiliating verbal conduct as a condition of continued employment, the statute must regulate some speech, because the aims of the statute simply cannot be achieved through less restrictive means. Indeed, were discriminatory speech not proscribed along with discriminatory conduct, the aims of Title VII would be defeated – as we can see clearly in *Rabidue* and this case. An employer possesses neither the freedom to refuse to promote a woman because of her gender nor the freedom to call her a “cunt” in front of clients. And, no logical view of the bounds of free expression of ideas could support an argument that it would have that right. Conversely, a workplace in which a employer does not possess the freedom to touch an employee in a suggestive manner, but has the ability to ask her in front of her fellow employees whether she has agreed to allow a man to “bugger” her to gain an account, as Charles Hardy asked Teresa Harris, also confounds any reasoned view of First Amendment protections.

As this Court pointed out last term in *R.A.V. v. St. Paul*, ___ U.S. ___, 112 S.Ct. 2538 (1992), because words

can sometimes violate laws directed not against speech but against conduct, a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. 112 S.Ct. at 2546. Such is clearly the case here. Unlike the ordinance at issue in *R.A.V.*, however, which sought to ban speech that “one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender,” 112 S.Ct. at 2541, Title VII is not directed to outlawing any speech.

No “official suppression of ideas” (a concern prominently discussed in *R.A.V.*) is involved here, only a concern that employment discrimination be eradicated. Indeed, Title VII does not even mention speech. Title VII does not seek to turn the workplace into a forum tolerating only “politically correct” speech; it seeks only to ensure that the statutory objectives are not frustrated by the inventiveness of the human mind, which can express unlawful discrimination in terms of both conduct and humiliating verbal taunts.

D. The workplace differs substantially from the free marketplace of ideas upon which this Court’s First Amendment cases are based.

Finally, in considering the implications of the First Amendment with regard to the proposed standard, amicus also asks this Court to consider the ways in which the workplace differs from the free marketplace of ideas

referred to in this Court's decisions.¹² See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

In the workplace, a woman does not have the ability to avoid the harasser's message by walking away. Neither does she have the ability to challenge the message at all without risking her job. This economic imperative to work led Congress to pass Title VII in an attempt to level the playing field so that each American could enjoy an equal chance to ply his or her trade.

Most people in our society have, after all, a fundamental need to work to provide the basic necessities for themselves and their families. They cannot afford to risk losing a job by challenging the harassing speech of an employer and they should not be forced to leave a job in order to protect themselves. Title VII, for that reason, seeks to ensure that a woman's right to employment is not saddled with the ludicrous duty to endure harassing comments, such as those made by Charles Hardy to Teresa Harris, or to remain in the ranks of the unemployed.

In the end, the tension here is not between free speech rights and the right to a hostile-free working environment. It is, under the facts of this particular case, a tension between the right of an employer to abuse his employees at whim in violation of statute and the

¹² In *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), for example, this Court recognized that the First Amendment rights of public employees were not absolute, but should be balanced against the State's interest as an employer in promoting the efficiency of its public services.

employee's right to perform work without being subjected to such abuse. To hold otherwise is to permit an employer to thwart the government's compelling interest in eradicating discrimination in the workplace with conduct, either verbal or physical, that perpetuates the continued subjugation of women workers.

CONCLUSION

For the reasons stated in this brief, NELA asks this Court to reverse the opinion of the lower court.

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

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Petitioner,

vs.

FORKLIFT SYSTEMS, INC.,

Respondent.

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On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

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BRIEF OF AMICUS CURIAE
FEMINISTS FOR FREE EXPRESSION
IN SUPPORT OF PETITIONER

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

INTEREST OF THE AMICUS

Feminists for Free Expression (FFE) is an organization of diverse feminist women who share a commitment both to gender equality and to preserving the individual's right and responsibility to read, view, and produce media materials of her or his choice, without the intervention of the government "for our own good."

Originally organized in January 1992 in opposition to the then-pending Pornography Victims Compensation Act (S. 1521), FFE gained national recognition for its role in defeating that proposed legislation. FFE's letter to the Senate Judiciary Committee protesting the censorial provisions of the bill was signed by over 200 prominent women authors, activists, attorneys and scholars including Betty Friedan,

Adrienne Rich, Nadine Strossen, Erica Jong, Nora Ephron, Jamaica Kincaid, and Judy Blume.

The list of signatories to the FFE letter included many artists and writers who have felt the sting of censorship in recent years: Judy Blume, whose insightful and compassionate books for adolescents have won wide acclaim but have also spawned such controversy that she has recently been deemed the "most censored author in America"; Erica Jong, whose frank treatment of women's sexuality in her best-selling novels has likewise drawn fire; Karen Finley and Holly Hughes, feminist playwrights and actresses whose NEA grants were improperly denied for political reasons, as a federal court recently concluded in an exceptional decision ordering that their grants be restored. See *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457 (C.D. Cal. 1992).

Since its role in the defeat of S. 1521, FFE has undertaken numerous other projects in defense of free speech rights, including its amicus brief in *Alexander v. United States*, currently pending before this Court. FFE has

also become prominently involved with issues arising from Title VII-inspired regulations of speech and access to expressive materials in the workplace, as in the pending challenge to the Los Angeles County Fire Department's prohibitions extending to firefighters' mere possession of sexually-oriented materials.

FFE's participation in these cases is motivated by a conviction that the rights of free expression are both indivisible and of crucial importance to feminists and to women generally. As many of FFE's artistic and literary members can attest, feminist expression is inherently controversial. Just as some would scapegoat erotic speech generally for a wide variety of social ills, feminist ideas have increasingly been blamed for social problems ranging from male unemployment to teenage pregnancy and "the decline of family values." Indeed, any written or visual work which deals frankly with women's lives and sexuality is at

risk in a climate of pervasive censorship.¹ Because the freedom to put forth controversial feminist ideas and to combat ignorance regarding sexuality is so essential to women's rights and well-being, FFE believes that it is particularly incumbent upon women to oppose censorship initiatives, including the disturbing trend toward overly-intrusive workplace regulations under the aegis of compliance with Title VII.

Although FFE strongly supports meritorious Title VII claims by workers (male and female) who have been subjected to discriminatory workplace harassment, the potential clash with First Amendment interests urgently requires that this area of the law be re-thought and clarified, if important free speech interests are not to be swept away in an impulsive tide of "politically correct" over-regulation.

¹ Works which have been officially or unofficially censored over the past few years include *The Diary of Anne Frank*, *Our Bodies, Ourselves*, Orwell's *1984*, Desmond Morris' *The Naked Ape*, Alice Walker's *The Color Purple*, and films such as *Romeo and Juliet*, *Victor/Victoria*, and *A Passage to India*. See Marcia Pally, *Sense and Censorship: The Vanity of Bonfires* at 5-8 (Americans for Constitutional Freedom and Freedom to Read Foundation 1991).

FFE is particularly concerned with the misplaced, almost exclusive emphasis on sexuality as the focus of this regulation, as opposed to a proper focus on harassment whatever form it may take. The undue anti-sexual emphasis, particularly when coupled with a standard of "offensiveness," entails unspoken and counter-productive assumptions about women - that women are indeed the "weaker sex" and cannot survive in the workplace unless it is cleansed of all banter or expression about sexuality. These assumptions fundamentally disserve women, perpetuating gender-based stereotypes of both men and women, but particularly of women as fragile, asexual beings whose delicate sensibilities require special protection. Moreover, the specter of paternalistic over-regulation of every nuance of interpersonal relations fosters a climate of mutual distrust and resentment between male and female co-workers, rather than an environment in which women and men can work constructively toward common understanding and equality.

For these reasons, FFE urges this Court to re-evaluate the "hostile work environment" theory, and particularly to make critical distinctions between very different sorts of workplace conduct and expression which may be alleged to be discriminatory under Title VII. For example, harassment targeting an individual worker, as alleged in this case, differs enormously from the mere possession or display of political or sexual material a co-worker might find "offensive," and to prohibit the latter as "harassment" comports with neither common sense, the statutory purpose, nor the First Amendment. FFE urges this Court to distinguish sharply between these qualitatively different bases for Title VII claims, to reject the criterion of mere "offensiveness," and to adopt a standard which focuses not on the plaintiff's subjective reactions to the conduct or expression involved, but rather on the harmfulness of repeated or pervasive harassing conduct which has demonstrably hindered an employee in his or her work performance. Such an approach would allow employers to formulate

reasonable workplace standards of conduct -- standards which can protect employees from discriminatory harassment without unconstitutionally attempting to cleanse of all controversy the workplaces which occupy such a central place in the life experience of most American adults.

The current "hostile work environment" standards spawn unduly censorial regulations and thus violate the First Amendment; they are, moreover, alternately over- or under-protective with respect to valid claims of discriminatory harassment. Because feminist speech is especially vulnerable to the same censorial pressures, FFE submits this brief as *amicus curiae* in an attempt to assist this Court in formulating appropriate standards which will at once protect all workers from invidious harassment while also maintaining due regard for our society's fundamental values of pluralism and free expression.

Also, EEAC has advised the Equal Employment Opportunity Commission (EEOC) on a formal and informal basis, including the filing of comments on EEOC's Interim Interpretive Guidelines on Sexual Harassment, published at 29 C.F.R. § 1604.11 (1980). Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case.

EEAC seeks to assist the Court in this case by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter that has not already been brought to its attention by the parties. Because of its substantial experience in these matters, EEAC is uniquely situated to brief this Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Petitioner Teresa Harris was employed as a Rental Manager by Respondent Forklift Systems, Inc. ("Forklift") from April 22, 1985 until she quit on

for sexual harassment); *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd of Teamsters*, 969 F.2d 1436 (3d Cir.), cert. denied, 113 S. Ct. 660 (1992) (overturning arbitration award reinstating employee terminated for sexual harassment); *Stockstill v. Shell Oil Co.*, No. 92-3415 (5th Cir.) (decision pending) (defamation suit based on employer's response to government investigator's inquiry); *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59 (2d Cir. 1992) (addressing the effect of an employer's prompt and effective response to a complaint of sexual harassment); and *Elrod v. Sears, Roebuck and Co.*, 939 F.2d 1466 (11th Cir. 1991) (age discrimination claim by employee terminated for sexual harassment).

October 1, 1987. Pet. App. A-8.² A few days after she left, Mrs. Harris filed a charge of sexual harassment against Forklift with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and later a suit in federal court. The case was tried before a magistrate in July 1990. Pet. App. A-6.

The magistrate concluded that Forklift's president, Charles Hardy, had made sex- and gender-based comments, some of which offended Mrs. Harris and would have offended a reasonable woman. Pet. App. A-33. Nevertheless, the magistrate determined, the conduct was insufficient to constitute a "hostile environment" under Title VII. Pet. App. A-26.

Although agreeing that Mr. Hardy's remarks "may at times have genuinely offended plaintiff," Pet. App. A-35, the magistrate concluded that the comments "would not have risen to the level of interfering with [a reasonable woman manager's] work performance," Pet. App. A-34, nor did they "creat[e] a working environment so poisoned as to be intimidating or abusive to plaintiff." Pet. App. A-35. The magistrate also stated that he "[did] not believe they were so severe as to be expected to seriously affect plaintiff's psychological well-being." Pet. App. A-33-34.

The district court adopted the magistrate's recommendation, Pet. App. A-4. The Sixth Circuit affirmed *per curiam*. Pet. App. A-1.

² References to the decision below, reproduced in the Appendix to the Petition for Writ of Certiorari, are designated at Pet. App. ____.

SUMMARY OF ARGUMENT

1. To prove a case of "hostile environment" sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, a plaintiff must show that the challenged conduct meets the standards enunciated by this Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986): that it is sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' " *Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). This includes proof that the challenged conduct: (1) would have the aforesaid effect on a reasonable person in the position of the alleged victim; (2) indeed was "unwelcome" to the alleged victim; and (3) altered the conditions of employment and created an abusive working environment for the victim. Proof that the victim suffered psychological injury is an appropriate way of making the necessary showing of the effect on the victim.

2. Any standard enunciated by this Court for employer liability for sexual harassment should take into consideration anti-harassment policies and procedures established by employers in response to this Court's guidance in *Meritor*. Where an employer has adopted a strong company policy prohibiting workplace sexual harassment and has established an adequate procedure for addressing complaints, the employer cannot be liable for a supervisor's or employee's creation of a hostile environment of which the employer had no actual or constructive knowledge if the alleged victim failed to take advantage of that procedure or if the employer took prompt and appropriate action.

3. An employer must be able to take prompt and appropriate action to combat improper sexual behavior in the workplace without having to prove that the conduct is serious or pervasive enough to be actionable under Title VII. Under no circumstances should the employer be required to prove that the alleged victim suffered psychological harm as a result of the harasser's conduct. Indeed, if an anti-harassment policy and procedure are effective, potentially harassing conduct should surface and be dealt with *before* it reaches a truly critical level. Where an employer, after investigation, believes in good faith that inappropriate behavior has occurred, the employer must be able to take immediate action, including discipline or even discharge of the offender without facing legal action by the harasser.

ARGUMENT

I. ANY STANDARD ESTABLISHED BY THIS COURT FOR THE PLAINTIFF'S BURDEN IN A "HOSTILE ENVIRONMENT" SEXUAL HARASSMENT CASE SHOULD INCLUDE PROOF OF DETRIMENTAL EFFECT ON THE PLAINTIFF.

A. Actionable Sexual Harassment Is Unwelcome Sexual Advances, Requests for Sexual Favors, and Other Verbal or Physical Conduct of a Sexual Nature That Is Sufficiently Severe or Pervasive To Alter the Conditions of the Victim's Employment and Create an Abusive Working Environment.

The standards for dealing with sexual harassment claims are well-known and have been relied upon by the employer community in dealing with workplace harassment. In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), this Court established the threshold for conduct that may be actionable sexual harassment under Title VII of the Civil Rights Act

of 1964, 42 U.S.C. § 2000e *et seq.* Although Title VII itself does not specifically mention “harassment,” it does make it an unlawful employment practice, *inter alia*, for an employer to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex” 42 U.S.C. § 2000e-2(a)(1). As this Court concluded in *Meritor*, “[t]he phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment.” *Meritor*, 477 U.S. at 64 (quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978)).

Accordingly, using the interpretive guidelines issued by the Equal Employment Opportunity Commission, the Court identified “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature” as the type of workplace conduct that could constitute sexual harassment.³ Finding that Title VII protects against more than economic harm, this Court ruled that such conduct may be actionable under Title VII “whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where ‘such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.’ ”⁴

In recognizing “hostile environment” sexual harassment, however, this Court noted that the parameters

³ *Meritor*, 477 U.S. at 65 (alteration in original) (quoting 29 C.F.R. § 1604.11, hereinafter “EEOC Guidelines”).

⁴ *Id.* at 65 (quoting 29 C.F.R. § 1604.11(a)).

of Title VII protection are limited by the statutory language from which the protection flows:

[N]ot all workplace conduct that may be described as ‘harassment’ affects a ‘term, condition, or privilege’ of employment within the meaning of Title VII. . . . For sexual harassment to be actionable, it must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’

Id. at 67 (alteration in original) (citations omitted).⁵

Accordingly, only conduct meeting this standard will support Title VII liability. As the Fifth Circuit pointed out, “the absence of [a tangible economic] detriment requires a commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment.” *Jones v. Flagship Int’l*, 793 F.2d 714, 720 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987).

In order to establish hostile environment sexual harassment, we submit that the plaintiff is required to prove that the challenged conduct: (1) would alter the conditions of employment and create an abusive working environment of a reasonable person in the position of the alleged victim; (2) indeed was shown to be “unwelcome” as indicated by the alleged victim’s conduct, 477 U.S. at 68; and (3) altered the conditions of employment and created an abusive working environment for the victim.

⁵ See also *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989) (quoting *Meritor*).

B. Initially, a Plaintiff Must Prove Harassment From the Standpoint of a Reasonable Person in the Position of the Alleged Victim.

The courts of appeals consistently require plaintiffs in sexual harassment cases to show that the conduct complained of objectively meets this Court's minimum threshold—that is, whether a reasonable person in the position of the victim would have concluded that the challenged conduct created an intimidating, hostile or offensive working environment. See, e.g., *Burns v. McGregor Elec. Indus., Inc.*, 955 F.2d 559, 566 (8th Cir. 1992) (finding conduct “sufficiently severe or pervasive” to affect a reasonable person and remanding for a finding of the effect on the plaintiff); *Brooms v. Regal Tube Co.*, 881 F.2d 412, 418 (7th Cir. 1989); *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989), modified on other grounds, 900 F.2d 27 (4th Cir. 1990). The Eleventh Circuit described the perspective from which the conduct should be viewed in a case of alleged harassment against a female plaintiff as that of a “reasonable woman.” *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991).

An objective standard based upon a reasonable victim guards against unreasonable claims. “Title VII does not serve ‘as a vehicle for vindicating the petty slights suffered by the hypersensitive.’” EEOC Policy Guidance on Current Issues of Sexual Harassment, No. N-915-050 (March 19, 1990) at 14 (reprinted at EEOC Compl. Man. (BNA) N:4031⁶

⁶ Shortly after *Meritor* was decided, the EEOC issued policy guidance to its field staff. It was reissued in March 1990 without substantial change. EEOC Policy Guidance on Current Issues of Sexual Harassment, No. N-915.035 (October 25, 1988) (reprinted at EEOC Compl. Man. (BNA) N:4001).

(hereinafter EEOC Policy Guidance) (quoting *Zabkowitz v. West Bend Co.*, 589 F. Supp. 780, 784 (E.D. Wis. 1984)). The standard, according to the EEOC, should be used to determine both: (1) whether a reasonable person's work environment would have been affected substantially; and (2) whether a reasonable person would have considered the conduct to be sexual in nature. *Id.*

C. The Plaintiff's Conduct Must Have Indicated That The Conduct Was Unwelcome.

As the Court pointed out in *Meritor*, another key element of an actionable sexual harassment claim is a showing that the alleged victim “by her conduct indicated that the alleged sexual advances were unwelcome. . . .” *Meritor*, 477 U.S. at 68. Where it is unclear whether or not the conduct was unwelcome, the court must look to “‘the record as a whole’ and ‘the totality of circumstances.’” *Meritor* at 69 (quoting 29 C.F.R. § 1604.11(b)).

A plaintiff can prove that conduct was unwelcome by showing “‘that the employee did not solicit or incite it, and the employee regarded the conduct as undesirable or offensive.’” *Burns v. McGregor Elec. Indus., Inc.*, 955 F.2d 559 (8th Cir. 1992) (quoting *Hall v. Gus Constr. Co., Inc.*, 842 F.2d 1010, 1014 (8th Cir. 1988) (quoting *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986)); EEOC Guidance at 7 (quoting *Henson v. City of Dundee*, 682 F.2d at 903 (11th Cir. 1982)).

**D. The Plaintiff Must Show Some Detrimental Effect
On the Terms and Conditions of Her Employment.**

Once the plaintiff has shown that she or he was the victim of unwelcome sexual harassment that would have altered the conditions of employment for a reasonable person and created an abusive working environment, the plaintiff still must show that the conduct actually had that effect on her. As the Fourth Circuit explained, "the fact finder must examine the evidence both from an objective perspective and from the point of view of the victim." *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989), *modified on other grounds*, 900 F.2d 27 (4th Cir. 1990). "The subjective factor is crucial because it demonstrates that the alleged conduct injured this particular plaintiff giving her a claim for judicial relief." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990).

Accordingly, "[o]nly if the court concludes that the conduct would adversely affect the work performance and the well-being of both a reasonable person and the particular plaintiff bringing the action may it find that the defendant has violated the plaintiff's rights under Title VII." *Brooms v. Regal Tube Co.*, 881 F.2d 412, 419 (7th Cir. 1989).⁷

⁷ One way to satisfy this requirement is to show that "the sexual harassment was sufficiently severe or persistent 'to affect seriously [the victim's] psychological well-being.'" *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1561 (11th Cir. 1987) (modification in original) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). See also *Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 193 (1st Cir. 1990) (noting that "district court was [not] clearly wrong in determining that the conduct was not of the type that would interfere with a reasonable person's work per-

**II. ANY STANDARD FOR EMPLOYER LIABILITY
MUST TAKE INTO CONSIDERATION THE EM-
PLOYER'S ANTI-HARASSMENT POLICIES AND
PROCEDURES.**

**A. An Employer Should Be Shielded From Liability
Where the Employer Has Taken Prompt and Ap-
propriate Action or Where the Plaintiff Fails To
Take Advantage of an Expressed Policy Against
Sexual Harassment and an Adequate Procedure
for Resolving Claims.**

**1. Strict Liability Does Not Apply In a Hostile
Environment Context.**

This Court has refused to hold employers automatically liable for "hostile environment" harassment by supervisors. *Meritor*, 477 U.S. at 72. In *Meritor*, both parties sought to have the Court establish a standard for employer liability or nonliability in these situations. The plaintiff sought strict liability, arguing that Title VII's definition of "employer"

formance, *nor* would it seriously affect a reasonable person's psychological well-being, at least to the extent required by Title VII") (emphasis added). As the Sixth Circuit has explained:

Assuming that the plaintiff satisfied the burden of proving that the defendant's conduct would have interfered with that reasonable individual's work performance and would have affected seriously the psychological well-being of that reasonable employee, the court is thereafter directed to determine if the plaintiff was actually offended by the defendant's conduct and suffered some degree of injury as a result of her exposure to the work environment.

Highlander v. K.F.C. Nat'l Management Co., 805 F.2d 644, 650 (6th Cir. 1986).

as including an "agent" ⁸ requires employer liability whenever a supervisory employee is involved in harassment in work-related circumstances. 477 U.S. at 70. The employer, on the contrary, contended that it could not be held liable for a supervisor's misconduct unless it had notice and failed to take action. *Id.*

In an *amicus curiae* brief, the EEOC departed from the harsh strict liability standard proposed in its 1980 Guidelines and suggested that application of "traditional agency principles" would be appropriate. *Id.* The EEOC explained that while agency principles generally lead to direct employer liability for a supervisor's actions in a *quid pro quo* case, hostile environment cases are different. There, the EEOC argued, agency principles require:

a rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, whether that procedure was reasonably responsive to the employee's complaint. If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, *the employer should be shielded from liability* absent actual knowledge of the sexually hostile environment (obtained, *e.g.*, by the filing of a charge with the EEOC or a comparable state agency).

⁸ Title VII defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person" 42 U.S.C. § 2000e(b) (emphasis added).

Brief for United States and EEOC as Amici Curiae in *Meritor* at 26 (quoted in *Meritor*, 477 U.S. at 71).

The Court agreed with the EEOC that "Congress wanted courts to look to agency principles for guidance in this area." *Meritor*, 477 U.S. at 72. Accordingly, the Court ruled that "the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors." *Id.*⁹

In *Meritor*, the Court encouraged employers to adopt effective anti-harassment policies. There, the employer argued that its policy against discrimination insulated it from liability. The Court disagreed in *Meritor* because the particular employer's general policy against discrimination "did not address sexual harassment in particular, and thus did not alert employees to their employer's interest in correcting that form of discrimination." 477 U.S. at 72-73. Further, the Bank's policy "apparently required an employee to complain first to her supervisor" who, in *Meritor*, was the alleged harasser. 477 U.S. at 73. In rejecting the employer's defense, the Court stated:

[The Bank's] contention that [the victim's] failure [to invoke the Bank's nondiscrimination procedure] should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.

*Id.*¹⁰

⁹ The majority's opinion thus can be read as rejecting the approach taken in the concurring opinion, which would have imposed a strict liability standard for hostile environment harassment by a supervisor. *Meritor*, 477 U.S. at 78 (Marshall, J., concurring).

¹⁰ Justice Marshall's concurring opinion stated:

Based in part on reliance on this statement in *Meritor*, EEAC's members have adopted specific and effective anti-harassment policies. Should the Court go beyond the specific issue presented in this case and elaborate upon this part of the *Meritor* decision, EEAC sets forth the following principles for the Court's assistance.

2. Based on the Application of Agency Principles, an Employer That Has an Expressed Policy Against Sexual Harassment and an Adequate Procedure For Resolving Claims Cannot Be Liable For a Supervisor's or Employee's Creation of a Hostile Environment of Which the Employer Lacked Actual or Constructive Knowledge If the Plaintiff Failed to Take Advantage of the Procedure or If the Employer Takes Prompt and Appropriate Action.

This Court in *Meritor* declined to establish an explicit rule as to when employers *would* be liable, other than the application of agency principles, referring to §§ 219-237 of the Restatement (Second) of Agency (1958). 477 U.S. at 72. These sections of the Restatement, which address the liability of a master for torts committed by a servant, clearly do not hold an employer responsible for every act of every employee. The relevant portions of § 219(2) explain generally that a master is not liable for actions outside the scope of employment unless the employer was negligent or reckless, or the servant acted with apparent

Where a complainant without good reason bypassed an internal complaint procedure she knew to be effective, a court may be reluctant to find constructive termination and thus to award reinstatement or backpay.

477 U.S. at 78.

authority.¹¹ Outrageous or abnormal acts generally are not within the scope of employment. § 235 and comment c. Neither are acts that are unauthorized unless, as noted above, the servant acts with apparent authority. § 228.

The EEOC's Policy Guidance gives the agency's view on how these principles apply to hostile environment cases, using an analysis similar to the agency's *amicus curiae* brief in *Meritor*. The Guidance also takes into consideration the factors that this Court suggested as being minimum components for an adequate anti-harassment program: (1) a specific policy prohibiting sexual harassment; and (2) a procedure that is "calculated to encourage victims of harassment to come forward" including more than one avenue of complaint. *Meritor*, 477 U.S. at 72-73.

First, the EEOC explains that an employer may be directly liable for hostile environment harassment by a supervisor "[i]f actual or constructive knowledge exists, and if the employer failed to take immediate and appropriate corrective action" EEOC Pol-

¹¹ Section 219 provides:

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) the master intended the conduct or the consequences, or

(b) the master was negligent or reckless, or

(c) the conduct violated a non-delegable duty of the master, or

(d) the servant purported to act to speak on behalf of the principal and there was reliance upon

icy Guidance at 23.¹² The employer who knows of a supervisor's harassing conduct and does not act, the EEOC contends, "by acquiescing, has brought the supervisor's actions within the scope of his employment." EEOC Policy Guidance at 25.

Next, the EEOC illustrates how an employer may be held liable for a supervisor's actions under agency principles even if the employer lacks actual or constructive notice. Under the theory of "apparent authority," the guidance states, an employer can be responsible if it lacks an effective anti-harassment policy and complaint procedure. According to the Commission, "in the absence of a strong, widely disseminated, and consistently enforced employer policy against sexual harassment, and an effective complaint procedure, employees could reasonably believe that a harassing supervisor's actions will be ignored, tolerated, or even condoned by upper management." EEOC Policy Guidance at 25.

Application of these principles compels a limitation of liability for an employer that *has* an expressed policy against harassment and an adequate procedure for resolving claims, where the alleged victim fails to bring the problem to the employer's attention. When

apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Restatement (Second) of Agency § 219 (1958).

¹² Notably, the agency also observes that "[t]his is the theory under which employers are liable for harassment by co-workers." While the agency has not revised its 1980 Guidelines, it clearly has abandoned the strict liability standard articulated at 29 C.F.R. § 1604.11(c) in accordance with the Court's holding in *Meritor* in favor of the standard at 29 C.F.R. § 1604.11(d) applicable to harassment by co-workers.

an employer has a well-disseminated anti-harassment policy, it cannot be directly liable for a supervisor's creation of a hostile environment absent evidence of actual or constructive knowledge of the supervisor's action. Since there will be no question that such conduct is unauthorized and indeed prohibited, it will be outside the scope of employment.

Likewise, the employer cannot be held responsible under an "apparent authority" theory. As the EEOC Policy Guidance states:

an employer can divest its supervisors of this apparent authority [to create a hostile working environment] by implementing a strong policy against sexual harassment and maintaining an effective complaint procedure. When employees know that recourse is available, they cannot reasonably believe that a harassing work environment is authorized or condoned by the employer. If an employee failed to use an effective, available complaint procedure, the employer may be able to prove the absence of apparent authority and thus the lack of an agency relationship, unless liability attaches under some other theory.

EEOC Policy Guidance at 26 (footnotes omitted).

Based on the guidance of this Court and the EEOC, employers such as EEAC's member companies have established clear and unequivocal policies forbidding sexual harassment in the workplace, and procedures for prompt and appropriate handling of complaints. These employers have put in practice the EEOC's strong recommendation that:

[a]n effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to em-

employees and effectively implemented. The employer should affirmatively raise the subject with all supervisory and non-supervisory employees, express strong disapproval, and explain the sanctions for harassment. The employer should also have a procedure for resolving sexual harassment complaints. The procedure should be designed to 'encourage victims of harassment to come forward' and should not require a victim to complain first to the offending supervisor. See *Vinson*, 106 S. Ct. at 2408. It should ensure confidentiality as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation.

EEOC Policy Guidance at 29.

When a defendant employer has in place a policy and procedure meeting these standards, allowing a Title VII recovery to a plaintiff who has failed to report harassing conduct is tantamount to strict liability. Where the affected employee does not make use of an anti-harassment policy, the employer has no reason to know that harassing behavior is occurring, assuming that there is no highly visible offensive conduct that would create constructive knowledge. Lacking such actual knowledge or any reason to know that unlawful conduct is occurring, the employer is unable to take steps to protect the victim from actions contrary to company policy. Yet, having set up an aggressive anti-harassment policy or procedure, the employer cannot be said to have acted negligently or recklessly. Restatement (Second) of Agency § 219(2)(b). An employer that has taken these precautions cannot be responsible under any theory if it does not know or have reason to know of the conduct and thus has no opportunity to take appropriate action.

As the EEOC's guidance suggests, a good procedure encourages employees to report incidents of harassment, and includes methods to bypass the direct supervisor if that person is also the harasser. Without the alleged victim's cooperation, even the finest anti-harassment policy is useless.

A plaintiff's refusal to make use of an available recourse that could have remedied the situation must negate any employer liability. Even the most conscientious, enlightened employer cannot control every day-to-day action of every employee, and must know of harassing behavior before it can take action to halt it. Holding such an employer liable for the actions of an employee that violate an express company policy when the employer did not know, and did not have reason to know of the offensive conduct, unfairly makes that employer a "deep pocket" liable for a situation over which it had no control.

Finally, prompt and effective action by an employer who is informed of harassing behavior likewise should obviate liability. An employer who can show that, upon learning that harassment has occurred, it conducted a thorough and *bona fide* investigation, reached a rational conclusion and took appropriate action, should be credited for those efforts. Indeed, the EEOC has strongly supported such actions. The agency's Guidelines take the position that employers who take "immediate and appropriate" corrective action are not liable for the acts of co-employees. 29 C.F.R. § 1604.11(d). This reasoning should apply as well to conduct of a supervisor that is unauthorized and contrary to company policy. Accordingly, federal courts since *Meritor* have based

their decisions on these factors.¹³ Thus, if an employer can demonstrate that it made a substantial effort to prevent the existence of a "hostile environment" it may be insulated from liability.

B. An Employer Should Be Able To Take Action Against A Harasser Without The Necessity of Proving that the Alleged Victim Suffered Psychological Harm. Moreover, an Employer's Good Faith in Investigating a Harassment Claim Should Protect The Employer From Legal Action by the Harasser.

In order for anti-harassment policies and programs to be effective, employers need considerable latitude in taking prompt and appropriate action against an accused harasser. In particular, an employer should not be required to prove that the accuser suffered "psychological harm" to justify its action against the harasser.

As noted above, prompt and appropriate employer action upon receipt of a complaint is a key component of an effective anti-harassment program. All too often, however, disciplinary action by the employer is met with resistance, if not legal action, by the accused harasser. See generally Hope A. Comisky, "Prompt and Effective Remedial Action?" What

¹³ See, e.g., *Swentek v. US Air, Inc.*, 830 F.2d 552 (4th Cir. 1987) (employer not liable for "hostile environment" sexual harassment under Title VII when it took immediate action, including investigation and discipline, upon receipt of complaint); *Kauffman v. Allied Signal*, 970 F.2d 178 (6th Cir.), cert. denied, 113 S. Ct. 831 (1992) (same); *Scherer v. Rockwell Int'l*, 975 F.2d 356 (7th Cir. 1992); *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424 (8th Cir. 1984) (same); *Giordano v. William Paterson College of New Jersey*, 60 Empl. Prac. Dec. (CCH) ¶ 41,899 (D.N.J. 1992).

Must an Employer Do to Avoid Liability for 'Hostile Work Environment' Sexual Harassment", 8 *The Labor Lawyer*, 181, 195-199 (1992); Ken Jennings and Melissa Clapp, "A Managerial Tightrope: Balancing Harassed and Harassing Employees' Rights in Sexual Discrimination Cases," *Labor Law Journal*, December 1989, 756, 763.

Under these circumstances, the employer's only legitimate choice is to take effective action to halt the harassment, and let the chips fall where they may. Unfortunately, that employer's reward for its commendable endeavor may be lengthy and costly litigation. Employees who have been disciplined for harassment may claim that the employer's reason is libelous, slanderous, defamatory, or a pretext for discrimination based on the employee's race or age, for example.

For example, in *Elrod v. Sears, Roebuck and Co.*, 939 F.2d 1466 (11th Cir. 1991), the plaintiff contended that he was discharged because of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 612 *et seq.* He established a *prima facie* case by showing that he was a member of the protected class, was replaced by one considerably younger, and was qualified for the job. *Id.* at 1469-70. The employer countered that Elrod was fired because he had sexually harassed female employees. *Id.* at 1470.

In such a case, the employer can rebut the presumption created by the plaintiff's *prima facie* case by explaining that it discharged the plaintiff for engaging in sexual harassment.¹⁴ The employer is not

¹⁴ In any "disparate treatment" employment discrimination case, for example, an employer rebuts a plaintiff's *prima facie*

required to *prove* a sexual harassment case in order to defend against a discrimination claim.¹⁵ As the Eleventh Circuit explained in *Elrod*:

Much of Elrod's proof at trial centered around whether Elrod was in fact guilty of the sexual harassment allegations leveled at him by his former co-workers. We can assume for purposes of this opinion that the complaining employees interviewed by [the company investigator] were lying through their teeth. The inquiry of the ADEA is limited to whether [company officials] *believed* that Elrod was guilty of harassment, and if so, whether this belief was the reason behind Elrod's discharge.

939 F.2d at 1470 (citations omitted) (emphasis in original). See also *Waggoner v. City of Garland*, 61 Fair Empl. Prac. Cas. (BNA) 889, 892 (5th Cir. 1993).

case of discrimination by articulating a legitimate, nondiscriminatory business reason for the challenged employment action. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

¹⁵ *Crimm v. Missouri Pac. R.R. Co.*, 750 F.2d 703 (8th Cir. 1984). "What is critical is whether or not the defendant employer in good faith believed plaintiff to be engaged in conduct which was inappropriate in the workplace." *French v. Mead Corp.*, 33 Fair Empl. Prac. Cas. (BNA) 635, 641 (S.D. Ohio 1983), *aff'd without opinion*, 758 F.2d 652 (4th Cir.), *cert. denied*, 474 U.S. 820 (1985) (employer's basis for terminating Title VII plaintiffs was not pretextual). See also *Johnson v. International Minerals and Chem. Corp.*, 40 Fair Empl. Prac. Cas. (BNA) 1651 (D.S.D. 1986) (granting motion for summary judgment on claims of wrongful discharge, breach of employment agreement, defamation, and intentional infliction of emotional distress by supervisors discharged for sexual harassment after investigation).

Accordingly, an employer's good faith, *i.e.*, a reasonable belief that an employee engaged in sexual harassment, is sufficient to establish a legitimate, nondiscriminatory reason for taking disciplinary action, and rebut the plaintiff's *prima facie* case of discrimination.

Frequently, when a well-communicated anti-harassment policy and accessible procedure are in place, the employer will learn about inappropriate behavior in the early stages, before it crosses the threshold of actionable sexual harassment. Observing the EEOC's admonition that "[a]n employer should take all steps necessary to prevent sexual harassment from occurring," 29 C.F.R. § 1604.11(f), these employers will take immediate, appropriate action regardless of whether the conduct is offensive enough to constitute a Title VII violation. It would make no sense to require employers—or victims—to wait until the conduct escalated to an abusive level before taking steps to stop it.

Indeed, if the employer did so, the victim unquestionably could argue that the employer had knowledge of this "hostile environment" and failed to act. "An employer is not required to tolerate the disruption and inefficiencies caused by a hostile workplace environment until the wrongdoer has so clearly violated the law that the victims are sure to prevail in a Title VII action." *Carosella v. United States Postal Service*, 816 F.2d 638, 643 (Fed. Cir. 1987). For example, in *Johnson v. Perkins Restaurants, Inc.*, 815 F.2d 1220 (8th Cir. 1987), the Eighth Circuit upheld the lower court's dismissal of the ADEA claim of a service technician who was fired almost instantly for

violating explicit company policy against sexual harassment and kissing a sixteen-year-old waitress, even though company policy required progressive discipline where appropriate.

Courts in other types of suits have given considerable latitude to employers acting in response to sexual harassment. For example, in a wrongful discharge case where a foreman was discharged for sexual harassment, the Tenth Circuit found the public policy opposing sexual harassment relevant to contract law, stating:

Public policy also affects our construction of this contract claim. Here, public policy operates to require a construction of contract terms in favor of giving the employer broad discretion in its efforts to eliminate sexual harassment from the workplace. In this area of judicially created contracts and contract rights, it is perfectly consistent to impose a rule of contract construction which favors the enforcement of a workplace free from offensive sexual conduct.

Williams v. Maremont Corp., 875 F.2d 1476, 1485 (10th Cir. 1989). Similarly, the Fifth Circuit has held that the public policy against sexual harassment supports a qualified privilege, and a presumption of good faith, overcoming a claim for libel and slander arising out of a management bulletin published after an employee was discharged for sexual harassment. *Garziano v. E.I. Du Pont De Nemours & Co.*, 818 F.2d 380 (5th Cir. 1987). *Accord Stockley v. AT&T Info. Sys., Inc.*, 687 F. Supp. 764, 769 (E.D.N.Y. 1988) ("communications made in connection with bona fide title VII investigations are protected by a qualified privilege" in a defamation suit by an offend-

ing employee)¹⁶; *DiSilva v. Polaroid Corp.*, No. 8828 (N.D. Mass. App. Div. January 4, 1985).

An employer who responds swiftly and effectively, yet fairly, to allegations of sexual harassment should not have to act at its peril when it discharges the offending employee. Also, at no time should the employer be required to prove the victim's sexual harassment case, let alone that the alleged victim suffered psychological damage. The employer's decision to discipline or discharge a known sexual harasser is more than a simple legitimate, nondiscriminatory business reason. The employer's actions further sound public policy, in addition to meeting a significant legal obligation placed on employers by Congress and the courts to protect the rights of innocent victims. If an employer's investigation produces a good faith belief that inappropriate conduct has occurred, and the employer takes disciplinary action, that action should be given special deference when it is later challenged by the offender.¹⁷

¹⁶ The court adopted the position advocated by the EEOC as *amicus curiae*. *Brief of the Equal Employment Opportunity Commission as Amicus Curiae In Support of Defendant's Motion For Summary Judgment, Stockley v. AT & T Info. Sys., Inc.*, No. 86 Civ. 1643 (RJD) (E.D.N.Y.).

¹⁷ Likewise, an employer who conducts a complete investigation and reaches a well-supported, reasonable judgment that sexual harassment has not occurred, and thus takes no action against the accused employee, should not be liable if additional facts are revealed through discovery that might alter the employer's conclusion.

CONCLUSION

For the reasons set forth above, the Equal Employment Advisory Council respectfully submits that the decision of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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